TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM [redacted] 1921

No. [redacted] 55

ALABAMA & VICKSBURG RAILWAY COMPANY AND UNITED STATES FIDELITY & GUARANTY COMPANY, PLAINTIFFS IN ERROR,

vs.

SMITH JOURNEY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI.

FILED MAY 14, 1920.

(27,884)

(27,684)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1919.

No. 929.

ALABAMA & VICKSBURG RAILWAY COMPANY AND UNITED STATES FIDELITY & GUARANTY COMPANY, PLAINTIFFS IN ERROR,

vs.

SMITH JOURNEY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MAY 27, 1920.

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1 Supreme Court of Mississippi, October Term, 1919.

Pleas and Proceedings Had and Done at a Regular Term of the Supreme Court of the State of Mississippi, Begun and Held at the Court Room in the City of Jackson, State of Mississippi, at the Capitol, on the second Monday of October, Being the 13th Day of October, 1919.

Present and presiding: Honorable Sydney Smith, Chief Justice; Honorable Sam C. Cook, Honorable Geo. H. Ethridge, Honorable Eugene O. Sykes and Honorable J. B. Holden, Associate Justices, Geo. C. Myers, Clerk and C. L. Johnson, Marshal.

Be it remembered that heretofore, to wit: on the 4th day of November, 1919, there was filed in the clerk's office of said Supreme Court a certain record on appeal from the Circuit Court of the Second District of Hinds County, Mississippi, which with the endorsements thereon is in words and figures following, to wit:

First District, Circuit Court Hinds County

No. 21013.

Record No. —.

ALABAMA & VICKSBURG R. R. Co.

vs.

SMITH JOURNEY.

Filed Nov. 4th, 1919. Geo. C. Myers, Clerk.

2 Oct. Term, 1919.

Pleas and Proceedings had and Done at a Regular Term of the Circuit Court in and for the Second District of Hinds County, Mississippi, Begun and Held at the Court-house thereof in the Town of Raymond, Mississippi, said Term Commencing on the 1st Monday of September, 1919, Being the First Day of September, 1919.

Present: Hon. W. H. Potter, Judge of the Seventh Judicial District of the State of Mississippi and presiding judge of this court, W. S. Wells, Sheriff; E. D. Fondren, Clerk; C. W. Robinson, stenographer.

Be it remembered, that on the 30th day of April, 1919, there was filed in the office of the Circuit Clerk, at Raymond, Mississippi, a certain declaration, which is in words and figures as follows, to wit:

STATE OF MISSISSIPPI,
County of Hinds:

In the Circuit Court, Second District.

No. —.

SMITH JOURNEY, Plaintiff,

vs.

THE ALABAMA & VICKSBURG RAILROAD, Defendant.

Declaration.

Smith Journey, plaintiff, by his attorney, complains of the Alabama & Vicksburg Railroad Company, defendant, of a plea of trespass on the case:

For that, whereas, the plaintiff, on or about the 24th day of October, 1917, in Hinds County, Mississippi, was and had been for many months prior thereto, a soldier in the Army of the United States of America, enlisted in Company K, of the First Mississippi Regiment of Infantry.

That on said date the said plaintiff, together with his said Company and Regiment, was regularly stationed at Vicksburg,
3 Mississippi; that prior to said date and for many months during the year 1917, the said plaintiff, and other soldiers in said company and regiment, had been legally detailed to do certain guard duty for the defendant railroad company in guarding its bridges, roadbed, rolling stock and property within the State of Mississippi.

That in accordance with said orders and detailed duties aforesaid, the said plaintiff did for a long time, to wit: for many months, perform said guard duty, as aforesaid for the said railroad company, defendant, as well as for other railroads running within the State of Mississippi.

That in consideration of said services so rendered by said plaintiff and other soldiers to defendant, the said defendant railroad company, in consideration thereof, transported the plaintiff and other soldiers on freight trains on its lines of railroads. And for many months prior thereto it established a custom of carrying the plaintiff and other soldiers on its lines of railroads in the State of Mississippi.

That on said night and date the said plaintiff was in the City of Jackson during the night time and desired to return to Vicksburg to join his company and regiment and went to the defendant and applied for transportation over the railroad lines to Vicksburg aforesaid; and it then and there indicated and pointed out to him one of its certain freight trains and invited him to board the same by way of an outside ladder, and promised to take the plaintiff safely to the city of Vicksburg; and the said plaintiff so accepted said transportation of said defendant on said freight train in its yards in the

city of Jackson, and was directed by the officers and agents in charge of said freight train to board said train by means of an outside ladder or steps as aforesaid.

The defendant well knew that it was in the night time and dark and that it owed to plaintiff the duty to exercise reasonable care not to injure him, but it then and there breached its duty to plaintiff but negligently had on a parallel track to said freight train, certain cars of lumber negligently parked with certain beams negligently extending beyond the edge of said cars, and said cars so loaded with lumber were allowed to stand too near the switch or point of junction of its said parallel railroads, and approximate strike against moving cars on said railroad, and the plaintiff then and there in the darkness, not knowing the danger of said beams and in obedience *of* the directions of the defendants, so climbed upon said freight car, when said defendant then and there negligently and carelessly moved said freight train and caused it to strike against protruding lumber and knock the plaintiff from said car to the ground and then and there negligently run said train over, crushed plaintiff's foot, and caused plaintiff to suffer permanent injuries during the remainder of his natural life, and to suffer for many weeks and months great physical pain and mental anguish, and to lie in bed for many months and be prevented from attending to his business and affairs and to lose the sum of $8—, and to lay out divers sums, to wit, $8—, in his efforts to relieve his pain and preventing said injury from becoming fatal, and the plaintiff was so caused to suffer blood poison from said wound and was caused to undergo two painful operations on said foot, and suffer intense and indescribable pain and anguish.

Wherefore plaintiff brings this suit against said defendant, the Alabama & Vicksburg Railroad Company, and demands judgment against said defendant for the sum of $15,000.00, together with interest and costs.

J. A. TEAT,
Attorney for Plaintiff.

Filed April 30th, 1918. E. D. Fondren, Clerk.

In the Circuit Court, Second District, of Hinds County, Mississippi.

No. 2922.

S. K. JOURNEY
vs.
ALABAMA & VICKSBURG RAILWAY COMPANY.

Plea in Abatement.

The defendant, pleading in abatement, shows that this court is without jurisdiction of this cause and without territorial jurisdiction of this defendant, because:

This defendant is and has been for many years past a railroad corporation and until, to-wit: the 30th day of December, A. D., 1917,

was a common carrier of freight and passengers, and its entire lines of railroad tracks were and are in the United States of America; that on the day and date last mentioned, without defendant's consent or connivance and against its will, the United States Government, by its officers and agents, and under authority of the laws of the United States, took over defendant's entire line of railway and all of defendant's properties, not only its railway tracks, but its engines, locomotives, cars and other property used or capable of being used in the business of a railroad or in the business of a carrier, and since said date the United States Government has continuously and exclusively controlled and operated defendant's railroad and its said property and is now operating and controlling the same; and from said date until now has excluded defendant from operating or controlling the same or any part thereof.

Defendant further shows that the plaintiff in this suit at the time his alleged cause of action accrued was not a resident of Hinds County, Mississippi, nor of the second circuit court district thereof, nor did he reside within the territorial jurisdiction of this court; on the contrary he was at said time a resident citizen of Attala
6 County, Mississippi without the territorial jurisdiction of this court; and the pretended cause of action pleaded in the declaration did not arise in the second circuit court district of Hinds County, Mississippi, but arose, if at all, in Jackson, and with in the first circuit court district of said Hinds County, and without the territorial jurisdiction of this court; and the injuries charged in the declaration to have been suffered by plaintiff, for which he sues, were not suffered by him in the second circuit court district of said county, nor within the territorial jurisdiction of this court, but were suffered by him, if at all, without the territorial jurisdiction of this court, and within the first circuit court district of said Hines County.

This suit was instituted and begun in this court and process therein issued on to-wit: the 30th day of April, A. D., 1918, after the United States Government had taken over and was in control of defendant's railway line and tracks and all of its property hereinbefore mentioned, and after the issuance and promulgation of the order made and promulgated by W. G. McAdoo, the Director General of Railroads hereinafter mentioned, pleaded and exhibited herewith as a part of this plea.

On the 9th day of April, 1918, the United States Government, acting in pursuance of law, by W. G. McAdoo, an officer of said government, its Director General of Railroads, issued and promulgated an order, numbered 18, having the force and effect of law, amended April 9, 1918, by general order of said Director General of Railroads, numbered 18 A; the order as amended prohibiting and prohibited the institution of suits against carriers, including railroads and including the defendant railroad or railway, in courts other than those of the county or district where the plaintiff resided at the
7 time of the accrual of the cause of action sued upon, or in the county or district where the cause of action arose. A copy of said order, No. 18, as amended by order No. 18 A, is hereto attached and herewith filed and made a part of this plea.

Wherefore, defendant avers that this suit was unlawfully instituted in this court and defendant, therefore, prays that it shall not be required to make other or further plea in this behalf and that this suit shall be abated and defendant hence discharged.

R. H. & J. H. THOMPSON,
Defendant's Attorneys.

Filed August 22d, 1918. E. D. Fondren, Clerk.

STATE OF MISSISSIPPI,
County of Hinds,
City of Jackson:

Personally came and appeared before the undersigned, a Notary Public in and for said city, county and State, R. H. Thompson, who being duly sworn says on oath, he is an agent and attorney of the Alabama & Vicksburg Railway Company charged with the defense of this suit, and that the matters of fact stated in the above and foregoing plea are true and correct as therein stated.

R. H. THOMPSON.

Sworn to and subscribed before me this the 21st day of August, 1918. In witness whereof I have hereunto subscribed my name and affixed my official seal, on the day and date herein last written.

J. H. THOMPSON,
[SEAL.] *Notary Public.*

8 United States Railroad Administration.

Office of the Director General.

Washington, April 9, 1918.

General Order No. 18.

Whereas the Act of Congress approved March 21, 1918, entitled "An Act to Provide for the Operation of Transportation Systems While Under Federal Control," provides (Section 10) "That carriers while under Federal control shall be subject to all laws and liabilities as common carriers, whether arising under State or Federal laws or at common law, except in so far as may be inconsistent with the provisions of this Act or with any order of the President * * * But no process, mesne or final, shall be levied against any property under such Federal control;" and

Whereas it appears that suits against the carriers for personal injuries, freight and damage claims, are being brought in States and jurisdictions far remote from the place where plaintiffs reside or where the cause of action arose, the effect thereof being that men operating the trains engaged in hauling war materials, troops, munitions or supplies, are required to leave their trains and attend court as witnesses, and travel sometimes for hundreds of miles from their

work, necessitating absence from their trains for days and sometimes for a week or more; which practice is highly prejudicial to the just interests of the government and seriously interferes with the physical operation of the railroads; and the practice of suing in remote jurisdictions is not necessary for the protection of the rights or the just interests of plaintiffs.

It is therefore ordered, that all suits against carriers while under Federal control must be brought in the county or district
9 where the plaintiff resides, or in the county or district where the cause of action arose.

W. G. McADOO,
Director General of Railroads.

United States Railroad Administration.

Office of the Director General.

Washington, April 18, 1918.

General Order No. 18A.

General Order No. 18 issued April 9, 1918, is hereby amended to read as follows:

"It is therefore ordered that all suits against carriers while under Federal control must be brought in the county or district where the plaintiff resided at the time of the accrual of the cause of action or in the county or district where the cause of action arose."

WM. G. McADOO,
Director General of Railroads.

United States Railroad Administration.

Office of Assistant to the Director General of Railroads.

Washington, April 9, 1918.

General Order No. 18.

Whereas, the act of Congress approved March 21, 1918, entitled "An Act to provide for the operation of transportation systems while under Federal Control," provides (Sec. 10) "That carriers while under Federal control shall be subject to all laws and liabilities as common carriers, whether arising under State or Federal Laws or at common law, except in so far as may be inconsistent with the provisions of this Act or with any order of the President * * *. But no process, mesne or final, shall be levied against any property under such Federal control"; and

10 Whereas it appears that suits against the carriers for personal injuries, freight and damage claims, are being brought in States and jurisdictions far remote from the place where plaintiffs reside or where the cause of action arose; the effect thereof being

that men operating the trains engaged in hauling war materials, troops, munitions, or supplies are required to leave their trains and attend court as witnesses and travel sometimes for hundreds of miles from their work, necessitating absence from their trains for days and sometimes for a week or more; which practice is highly prejudicial to the just interests of the Government and seriously interferes with the physical operation of the railroads; and the practice of suing in remote jurisdictions is not necessary for the protection of the rights or the just interests of plaintiffs:

It is therefore ordered, That all suits against carriers while under Federal control must be brought in the county or district where the plaintiff resided at the time of the accrual of the cause of action, or in the county or district where the cause of action arose.

(Signed) W. G. McADOO,
Director General of Railroads.

In the absence of the Director General, and as Assistant to the Director General, having in his absence charge of the records of his office and authority to issue this certificate, I hereby certify that the copy of General Order No. 18, United States Railroad Administration, Office of the Director General, Washington, April 9, 1918, as amended by General Order No. 18A of said Director General, April 18, 1918, hereto attached, is a full, true, complete and correct
11 copy of the original order as amended, signed by said Director General of Railroads, and that on this 20th day of May, 1918, said order is in full force and effect in all provisions as therein set forth.

WALKER D. HINES,
Assistant to the Director General.

Washington, Government Printing Office: 1918.

54778B-18.

Filed August 22, 1918. E. D. Fondren, Clerk.

In the Circuit Court, Second District of Hinds County, Mississippi.

S. K. JOURNEY, Plaintiff,

vs.

ALABAMA & VICKSBURG RAILWAY COMPANY, Defendant.

And now comes the plaintiff in the above styled cause and demurs to defendant's plea in abatement and for grounds of demurrer assigns the following, to-wit:

1. That the said plea in abatement is wholly insufficient in law.

2. That said plea in abatement is without authority of law.

3. That said plea in abatement pleads an order of the Director General of Railroads, which order of said Director General is not law and not binding upon plaintiff.

4. That said order of said Director General is in conflict with the Constitution of the United States in that it undertakes to deny the plaintiff a trial of his cause in a court of competent jurisdiction.

5. Because the Act of Congress of March 21, 1918 does not give authority to the Director General of Railroads to limit the jurisdiction of the cause of action in the above styled suit.

12 6. Because said plea is in violation of the said act of Congress and is without authority of law and contrary to the law.

Wherefore the plaintiff prays judgment of the court, etc.

J. A. TEAT.
Counsel for Plaintiff.

Filed Sept. 2, 1918. E. D. Fondren, Clerk.

Judgment Sustaining Demurrer.

S. K. JOURNEY

vs.

ALABAMA & VICKSBURG RAILWAY COMPANY.

This cause was heard and considered before the Judge in vacation by consent of parties, on the demurrer of the plaintiff to the defendant's plea in abatement and the court being of opinion that the order of the United States Director General of Railroads pleaded was and is unauthorized by law, wherefore said demurrer is here now and hereby sustained and the plea in abatement adjudged insufficient. The defendant at once upon the announcement by the judge of his ruling on said demurrer excepted to the ruling of the court and said exception was and is duly allowed and this order is to be treated as if a formal bill of exceptions showing that defendant immediately and seasonably excepted as above stated.

The defendant is granted leave to plead further within ten days after the entry of this order on the minutes of the court. And the Clerk of the Circuit Court of Hinds County, Mississippi, Second District of said County, is directed to enter this judgment on the Minutes of the court as a vacation judgment.

13 Ordered this September 4th, 1918.

W. H. POTTER.
Judge.

Hinds County, Mississippi, Circuit Court, Second District.

S. K. JOURNEY

vs.

ALABAMA & VICKSBURG RAILWAY COMPANY.

The defendant the Alabama & Vicksburg Railway Company for plea in this behalf says:

It is not guilty of the said supposed wrongs and injuries laid to its charge in and by the declaration in this cause nor of any part thereof. And this defendant prays may be inquired of by the country.

R. H. & J. H. THOMPSON,
Attorneys.

Notice under Above Plea.

The plaintiff and his attorney will take notice that on the trial of this case testimony will be offered to show and showing that at the time and upon the occasion mentioned in the declaration that plaintiff was guilty of negligence contributing to and causing the injuries for which he sues, in this: Plaintiff undertook to board and jumped upon a moving train of cars and his injuries were received wholly in consequence of his own reckless and negligent act in so jumping upon and undertaking to board said moving train.

R. H. & J. H. THOMPSON,
Attorneys.

Filed Sept. 1st, 1918. E. D. Fondren, Clerk. A. R. Epperson, D. C.

14 In the Circuit Court of the Second Judicial District of Hinds County, State of Mississippi.

SMITH JOURNEY, Plaintiff,

vs.

THE ALABAMA & VICKSBURG RAILROAD, Defendant.

Amended Declaration.

And now comes Smith Journey, plaintiff in the above styled cause, by his attorneys, Teat, Teat & Potter, and having first obtained leave of the court files this his amended declaration and complains of the Alabama & Vicksburg Railroad Company, defendant, of a plea of trespass on the case.

For that, whereas, the plaintiff, on or about the 24th day of October, 1917, in Hinds County, Mississippi, was and had been for many months prior thereto a soldier in the Army of the United States of America, enlisted in Company K of the First Mississippi Regiment of Infantry.

That on said date the said plaintiff, together with his said company and regiment was regularly stationed at Vicksburg, Mississippi; that prior to said date and for many months during the year 1917, the said plaintiff, and other soldiers in said Company and Regiment, had been legally detailed to do certain guard duty for the said railroad company in guarding its bridges, road-bed, rolling-stock and property within the State of Mississippi.

That in accordance with said orders and detailed duties aforesaid, the said plaintiff did for a long time, to-wit, for many months, perform said guard duty as aforesaid for the said railroad company, defendant, as well as for other railroads running within the State of Mississippi.

That in consideration of said service so rendered by said plaintiff and other soldiers to defendant the said railroad company,
15 in consideration thereof, transported the plaintiff and other soldiers on freight trains on its lines of railroad. And for many months prior thereto it established a custom of carrying the plaintiff and other soldiers on its lines of railroad in the State of Mississippi.

That on said day and date the said plaintiff was in the city of Jackson during the night time and desired to return to Vicksburg and join his company and regiment and went to the defendant and applied for transportation over the railroad lines to Vicksburg aforesaid; and it then and there indicated and pointed out to him one of its certain freight trains and invited him to board the same by way of an outside ladder, and promised to take the plaintiff safely to the City of Vicksburg; and the plaintiff so accepted said transportation of said defendant on said freight train in its yards in the City of Jackson, and was directed by the officers and agents in charge of said freight train to board said train by means of an outside ladder or steps aforesaid, and did so board said train and then and there became a passenger on said train.

The defendant well knew that it was in the night time and dark and that it owed to plaintiff the duty to exercise the highest degree of care not to injure him, but it then and there breached its duty to plaintiff and negligently had on a parallel track to said freight train, certain cars of lumber negligently parked with certain beams negligently extending beyond the edge of said cars, and said cars so loaded with said lumber were allowed to stand too near the switch or point of junction of its said parallel railroads, and approximate strike against moving cars on said railroad, and the plaintiff then and there in the darkness, not knowing the danger of the said beams and in obedience *of* the directions of the defendant, so
16 climbed upon said freight car, when said defendant then and there negligently and carelessly moved said freight train and caused it to strike against protruding lumber and knock said plaintiff from said car to the ground and then and there negligently ran said train over and crushed plaintiff's foot, and caused plaintiff to suffer permanent injuries during the remainder of his natural life, and to suffer for many weeks and months great physical pain and mental anguish, and to lie in bed for many months and be prevented from attending to his business and affairs and to lose the sum of $8—, and to lay out divers sums of money, to-wit $8—, in his effort to relieve his pain and preventing said injury from becoming fatal, and the said plaintiff was so caused to suffer blood-poison from said wound and was caused to undergo two harmful operations on said foot, and suffer intense and indescribable pain and anguish.

Second count. And for a second count the plaintiff says that he became a passenger for reward on a certain train of the said defendant's

as aforesaid and that the conductor of the said train — and there directed him to climb upon the top of a certain freight car in said train; that he started and attempted to climb up the side of the said freight car; that it then and there became and was the duty of the said defendant to allow him sufficient time to reach a place of safety before starting said train, but this the defendant wholly failed to do, but then and there negligently, carelessly, willfully, recklessly and wantonly did start said freight train before said plaintiff had sufficient time to reach a place of safety and while he was climbing up the side of said freight car by means of grab-irons attached thereto;

17 that by reason of said breach of said duty then and there owed to said plaintiff by said defendant, said plaintiff was then and there negligently brushed off of said car by a protruding stick of lumber from another freight car on a parallel track and down to and against the ground and his foot was thereby thrown under said train and was then and there crushed and the plaintiff was caused to suffer permanent injury during the remainder of his natural life and to lie in bed for many months and be prevented from attending to his business and affairs and to lose the sum of $— and to suffer for many months great physical pain and mental anguish and to spend divers sums of money, to-wit, $—, in his efforts to relieve his pain and prevent said injury from becoming fatal, and the said plaintiff was so caused to suffer blood-poison in said wound and was caused to undergo two harmful operations on said foot and to suffer indescribable pain and anguish, all of which was caused directly and approximately by the negligent failure of the said defendant to allow the said plaintiff sufficient time to reach a place of safety on said train before starting same.

To the damage of the said plaintiff in the sum of $15,000.00 wherefore he brings this his suit and demands judgment against said defendant, in the sum of $15,000.00, together with interests and costs.

TEAT, TEAT & POTTER,
Attorneys for Plaintiff.

Filed Aug. 30, 1919. E. D. Fondren, Clerk.

Circuit Court, Second Judicial District, Hinds County, Mississippi.

SMITH JOURNEY
vs.
ALABAMA & VICKSBURG RAILWAY COMPANY.

Defendant's Plea to Amended Declaration.

18 The defendant for plea to the amended declaration filed in this cause, says:

It is not guilty of the said supposed wrongs and injuries laid to its charge, or of any part thereof.

Of this defendant puts itself upon the country.

R. H. & J. H. THOMPSON,
Attorneys for Defendant.

Notice under Above Plea.

The plaintiff and his attorneys will take notice that on the trial of this case testimony will be offered to show and showing that at the time and upon the occasion mentioned in the declaration the plaintiff was guilty of negligence contributing to and causing the injuries for which he sues, in this, plaintiff undertook to board and jump upon a moving train of cars and his injury was received wholly in consequence of his reckless and negligent act in so undertaking to jump upon said moving train. Testimony will be further offered to show that at the time and upon the occasion mentioned in the declaration plaintiff was not a passenger but was a trespasser in attempting to jump upon defendant's train.

R. H. & J. H. THOMPSON,
Attorneys for Defendant.

Filed Sept. 1st, 1919. E. D. Fondren, Clerk.

19 STATE OF MISSISSIPPI,
Hinds County, Second District:

In the Circuit Court, September Term, 1919.

No. —.

SMITH JOURNEY
vs.
ALABAMA & VICKSBURG R. R. Co.

Be it remembered that heretofore, to-wit, on Monday the First day of September, 1919, being one of the regular days of the Circuit Court of Hinds County, Mississippi, Second District this cause came on to be heard before Honorable W. H. Potter, Judge of said Court, and a jury in said court, whereupon the following testimony was taken and proceedings had in due form of law.

Messrs. Teat, Teat & Potter, Appearing for the plaintiff.

Messrs. R. H. & J. H. Thompson, Appearing for the defendant.

Whereupon the plaintiff, to maintain the issues on his behalf, introduced the following evidence, to-wit:

The Defendant thereupon introduced the following testimony:

Judgment.

No. 2922.

SMITH JOURNEY
vs.
A. & V. RY. Co.

Comes the parties by their attorneys, and issue being joined, came a jury of good and lawful men, to-wit: Geo. C. McLaurin and eleven

others, who being duly empanelled and sworn, and the issue submitted to them upon their oaths do say, "we, the jury find for the plaintiff and assess his damages at $5,000.00."

20 It is therefore considered by the court and so ordered and adjudged that the plaintiff Smith Journey, do have and recover of and from the defendant, The Alabama & Vicksburg Railway Company, the said sum of Five Thousand Dollars, ($5,000.00), as assessed by the jury, together with all costs in this behalf expended, for all of which execution may issue.

Tuesday, September 2d, 1919.

M. B. 28, page 120.

Motion for New Trial.

SMITH JOURNEY

vs.

ALABAMA & VICKSBURG RAILWAY COMPANY.

Defendant moves the court to set aside the verdict and judgment rendered and entered against it in this cause on the 2d day of September, 1919 and to grant it a new trial of this cause. As grounds in support of this motion defendant assigns the following:

1. The court erred in overruling defendant's motion, made at the conclusion of plaintiff's testimony, to exclude the evidence offered by plaintiff and to direct the jury to find for defendant.

2. The court erred in refusing to grant the peremptory instruction asked on behalf of defendant.

3. The court erred in refusing all of the instructions asked by defendant marked "refused."

4. The court erred in granting each and every one of the instructions asked on behalf of plaintiff, marked "Given."

5. The jury found contrary to the evidence.

6. The jury found contrary to the instructions of the court.

7. The jury found contrary to the law and the evidence.

8. The verdict is excessive and shocking to the conscience.

Other causes to be assigned at the hearing.

Wherefore, Etc.

R. H. & J. H. THOMPSON AND
FULTON THOMPSON,
Attorneys for Defendant.

Messrs. Teat, Teat & Potter, Contra.

Filed Sept. 2, 1919. E. D. Fondren, Clerk.

21 *Order Overruling Motion for New Trial.*

No. 2922.

SMITH JOURNEY

vs.

A. & V. Ry. Co.

This cause coming on to be heard this September 2d, 1919, upon defendant's motion to set aside the verdict and judgment this day entered against it in this cause, and to grant it a new trial herein, and the court having considered the same, and being of the opinion the said motion should be overruled. It is therefore considered by the court, and so ordered that said motion be and the same is hereby overruled. To which action of the court in overruling said motion the defendant then and there in open court instantly excepted.

Tuesday, September 2d, 1919.

M. B. 18, Page 121.

Notice to Stenographer.

Raymond, Miss., Sept. 2, 1919.

C. W. Robinson, Esq., Official Court Stenographer, Circuit Court Hinds County, Second District.

DEAR SIR:

You will please taken notice that it is the intention of the defendant to appeal from the judgment rendered against it in
22 the cause No. 2922 on the docket of the Circuit Court, Second District, Hinds County, Mississippi, entitled Smith Journey vs. Alabama & Vicksburg Railway Company, to the Supreme Court of Mississippi. You will please, therefore, transcribe your notes of the testimony and file the same with the clerk of this court within the time and in the manner provided by law.

Yours truly,

R. H. & J. H. THOMPSON AND
FULTON THOMPSON,
Attorneys for the Defendant,
Alabama & Vicksburg Railway Company.

I, C. W. Robinson, Official Court Reporter of the Circuit Court of the Second District of Hinds County, Mississippi, acknowledge receipt of a copy of the above notice at Raymond, Miss., this Sept. 2, 1919.

C. W. ROBINSON,
Official Court Reporter.

Filed Sept. 2d, 1919. E. D. Fondren, Clerk.

In the Circuit Court, Second District, Hinds County, Mississippi.

SMITH K. JOURNEY

vs.

ALABAMA & VICKSBURG RAILWAY COMPANY.

Know all men by these presents that we, Alabama & Vicksburg Railway Company, as principal, and the United States Fidelity & Guaranty Company, as surety, are held and firmly bound unto Smith K. Journey in the penal sum of Ten Thousand Dollars, for the payment of which well and truly to be made we bind ourselves, heirs, representatives, successors and assigns, firmly by these presents.

23 The condition of this obligation is such that, whereas at the regular September, 1919, term of this court a judgment was rendered against the principle obligor herein in favor of the obligee herein for the sum of $5,000.00 and costs; and whereas the principle obligor herein feeling aggrieved at the rendition of said judgment, hath prayed for and been granted an appeal therefrom to the Supreme Court of Mississippi: Now, therefore, if the principal obligor herein shall well and truly pay said judgment and abide by and satisfy the same in case said judgment is by said Supreme Court affirmed, then this obligation is to be void, otherwise it is to remain in full force and effect.

Witness our signatures this 20th day of October, 1919.

ALABAMA & VICKSBURG
RAILROAD CO.,
Principal.
By J. H. THOMPSON,
[SEAL.] *Its Attorney of Record.*
THE UNITED STATES FIDELITY
& GUARANTY CO.,
By J. F. ROBINSON,
Att'y in Fact.

Filed and Approved, Oct. 21, 1919. E. D. Fondren, Clk., J. P. Cadwallader, D. C.

Clerk's Certificate.

SMITH K. JOURNEY

vs.

A. & V. RY. CO.

I, E. D. Fondren, Clerk of the Circuit Court, in and for the County of Hinds, in said state, do hereby certify that the foregoing 269 pages is a true and correct copy of transcript of record of Cause No.

2922. Smith K. Journey vs. A. & V. Ry. Co., as the same appears of record and on file in my office at Raymond, Miss.

Given under my hand and official seal this the 1st day of November, 1919.

[SEAL.] E. D. FONDREN,
Clerk.
By J. P. CADWALLADER, *D. C.*

Clerk's Transcript fee, 269 pages at 35c per page	$94.15
Citation, Bond and Certificate	1.25
Binding fee, paid by clerk, 2 Volumes	1.20
	$96.60

24 *Summons to Supreme Court from Circuit Court.*

Secs. 72, 3413 and 4342 Annotated Code, 1892.

STATE OF MISSISSIPPI:

To the Sheriff of Hinds County, in said State:

You are hereby commanded to summon Smith Journey, Appellee, or Teat, Teat & Potter, Attorneys in fact or of record, if to be found in your County, to appear before the Supreme Court of the State of Mississippi at the Capitol, in the City of Jackson, in the County of Hinds, and State aforesaid, on the 2d Monday of January, A. D. 1920, then and there to answer the appeal of Alabama & Vicksburg Railroad Company from a judgment of the Circuit Court of the County of Hinds in said State, rendered against Appellant on the 2d day of September, A. D. 1919, at the September Term, A. D. 1919, of said Circuit Court, in favor of said Appellee, for Five Thousand ($5,000.00) Dollars, and have there then this writ.

Given under my hand and the seal of said Circuit Court, at my office in Jackson, Miss., and issued this the 1st day of November, A. D. 1919.

[SEAL.] E. D. FONDREN,
Circuit Clerk,
By J. P. CADWALLADER, *D. C.*

Sheriff's Return.

Executed personally on the law firm of Teat & Teat & Potter by delivering a true copy of this writ to J. A. Teat, a member of the firm of Teat, Teat & Potter, this the 1st day of Nov., 1919.

W. S. WELLS,
Sheriff.
By J. S. SMITH, *D. S.*

25 Supreme Court of Mississippi, October Term, 1919.

No. 21013.

ALABAMA & VICKSBURG RAILWAY COMPANY, Appellant,

vs.

SMITH JOURNEY, Appellant.

Assignment of Errors.

The appellant, the Alabama & Vicksburg Railway Company, defendant in the court below, shows to the court that there are divers errors apparent of record in this cause prejudicial to it, and of said errors the appellant assigns the following, the most flagrant of them, as causes for the reversal of the illegal and unjust judgment from which the appeal in this cause was taken and is prosecuted.

First. The court below erred in sustaining the demurrer of the plaintiff's plea in abatement. Demurrer, record p. 12; plea in abatement and exhibits thereto, record pp. 5 to 11; judgment sustaining the demurrer, record p. 13.

Second. The court below erred in each and every one of its rulings adverse to appellant, made during the introduction of the evidence and the testimony, as specified in the bill of particulars made an exhibit and attached to this assignment of error. Each of said rulings is separately assigned as error and they are not jointly assigned.

Third. The court below erred in overruling the motions of appellant (Record pp. 96, 97 and 98) to exclude all of plaintiff's testimony and to direct the jury to find for the defendant.

Fourth. The court below erred in giving each of the instructions (Record pp. 257, 258) granted at the request of plaintiff. The giving of each of said instructions is separately assigned as error, and this assignment is not directed to them jointly.

Fifth. The court below erred in refusing each of the in-
26 structions (Record pp. 262, 263, 264) asked by defendant, appellant, which the court refused to give. The refusal of each of said instructions is separately assigned as error, and this assignment is not directed to them jointly.

Sixth. The court below erred in over-ruling defendant's appellant's motion (Record pp. 266, 267) for a new trial, for each and every one of the grounds and reasons assigned in said motion.

Seventh. Other causes to be presented on the hearing.

Wherefore, appellant prays the court to reverse the erroneous and unjust judgment appealed from and, if the record will justify so doing for the rendition of a final judgment in its favor.

And as in duty bound, appellant will ever pray.

Respectfully submitted,

FULTON THOMPSON AND
R. H. & J. H. THOMPSON,
Attorneys for Appellant.

A copy of the above assignment of errors, and of the bill of particulars made a part thereof, was this day forwarded by mail, postage prepaid, to Messrs. Teat, Teat & Potter, attorneys of record for the appellee, Journey, addressed to them at Jackson, Mississippi, their place of residence and business, and their usual post office address.

Done December 18, 1919.

R. H. THOMPSON,
Of Counsel for Appellant.

27 Supreme Court of Mississippi.

No. 21013.

ALABAMA & VICKSBURG RAILWAY COMPANY

v.

SMITH JOURNEY.

Bill of Particulars and Specifications of Erroneous Ruling by the Trial Court Prejudicial to Appellant, Made During the Introduction of the Evidence; the Same to be Attached to and Made Part of the Assignment of Errors in this Case.

(2) The court below (Record, bottom pp. 43, 44, 45) erred in over-ruling defendant's objection to the question propounded by plaintiff's attorney to their client as a witness asking whether soldiers were permitted by the defendant to ride its trains, with or without transportation.

(*b*) The court below erred in overruling the defendant's objection (Record, bottom p. 45) to exclude the witness' answer to a question asked by his attorney; the answer being in these words: "I never was refused passage, and none of the boys out or around Vicksburg, when they got ready to come to Jackson or go from Jackson, were ever refused that I know of."

(*c*) The court below erred (Record, bottom p. 61) in sustaining the objection of plaintiff's attorney asked his client in these words: "Q. Were you ever convicted on indictment No. 3099 in the circuit court of Attala County, for embezzlement?"

(*d*) The court below erred (Record, bottom p. 92) in sustaining the objection made by the plaintiff's attorney to a question pro-

pounded to him by defendant's attorney on cross examination, the question reading: "Q. You have stated in answer to a question on direct examination that the Railway Company permitted soldiers to ride free; I will ask you to state if it is not a fact that Col.
28 George C. Hoskins, in command of your regiment, issued orders directing all soldiers under his supervision to keep off of trains, except when they were ordered to make trips or authorized to make trips and when they had transportation?"

(e) The court below erred (Record bottom p. 116) in sustaining the objection made by plaintiff's attorney to an answer of witness Stamm, the answer being in these words: "A. The Alabama & Vicksburg Railroad made the most vigorous efforts to prevent soldiers from riding on freight trains on the A. & V. It became such a practice that the Superintendent, in company with myself, made a trip to Jackson to see Col. Hoskins, who was the commanding officer of the 155 regiment, with a view to putting a stop to that practice, and Col. Hoskins assured us that he would use every effort in his power to bring about that result."

(f) The court below erred (Record bottom p. 126) in sustaining the objection of plaintiff's attorney to the question propounded on re-examination by defendant's attorney to witness Stamm, the question reading: "Q. Mr. Stamm, without saying what Col. Hoskins said, I will ask you what, if any, assurances Col. Hoskins gave about keeping the soldiers off of the trains."

(g) The court below erred (Record bottom pp. 126, 127) in refusing, on the objection of the plaintiff's attorney, to allow witness Stamm to answer a question propounded to him by defendant's attorney, the question being: "Q. You made a special trip from Vicksburg over here with the Superintendent with you for that purpose?"

(h) The court below erred in sustaining the motion made by the plaintiff's attorney (Record bottom pp. 175, 176) to exclude all the testimony of defendant's witness G. A. Chapman.

(i) The court below erred (Record bottom pp. 177) in excluding, on motion of plaintiff's attorney, all of the testimony of de-
29 fendant's witness W. C. Lloyd.

FULTON THOMPSON AND
R. H. & J. H. THOMPSON,
Attorneys for the Appellant.

Endorsed: Filed Dec. 19, 1919. Geo. C. Myers, Clerk.

Order Submitting.

No. 21013.

ALABAMA & VICKSBURG RAILWAY CO.

vs.

SMITH JOURNEY.

Submitted on briefs by R. H. & J. H. Thompson for appellant and Teat & Potter for appellee.

Tuesday, February 24th, 1920.

M. Book, "U," p. 598.

Judgment of Court.

No. 21013.

ALABAMA & VICKSBURG RY. COMPANY

v.

SMITH JOURNEY.

This cause having been submitted at a former term of this Court on the record herein from the Circuit Court of Hinds County, 2nd. Dist., and this Court having sufficiently examined and considered the same and being of opinion that there is no error therein, doth order and adjudge that the judgment of said Circuit Court rendered in this cause at the September Term, 1919, on the 2nd. day of September, 1919, be and the same is hereby affirmed, and that appellee do have and recover of appellant and the U. S. Fidelity & Guaranty Company, surety in the supersedeas bond, the sum of Five Thousand Dollars, the amount of the judgment in the Court below, together with the further sum of Two Hundred and Fifty Dollars, being damages at the rate of Five per centum as allowed by law, as well as interest on the amount of said judgment from date of rendition till paid at the rate of Six per centum per annum and also the costs of this cause in this Court and in the court below, to be taxed, &c.

Monday, April 12th, 1920.

M. Book "W", p. 7.

Opinion of Supreme Court of Mississippi.

In the Supreme Court of Mississippi. In Banc.

Cook, K.

No. 21013.

ALABAMA & VICKSBURG RAILWAY COMPANY

vs.

SMITH K. JOURNEY.

The appellee instituted a suit against the appellant in the Second District of Hinds County for personal injuries inflicted upon him by the appellant Railway Company, through its negligent operation of its train.

The Railway Company filed a plea in abatement to the effect that the suit should have been begun in the First District of Hinds County, the place where the alleged cause of action accrued, or in the Circuit Court of Attala County, of which county the plaintiff was a resident citizen at the time the alleged cause of action accrued.

The plaintiff demurred to the plea in abatement, and his demurrer was sustained. The defendant then filed the general issue and notice of contributory negligence on the part of the plaintiff.

We do not think that the Court erred in the trial of the case upon its merits. The question raised by the plea in abatement is of some interest, and we have decided to express our views thereon. The concrete question is about this:

Did Congress confer upon the President of the United States or the Director of Railroads the power to fix the venue of actions against the Railroads, while the same were under Federal control? This question is pertinent here because the plea in abatement is
31 based upon the assumption that Congress did delegate to the Executive this power. If the defendant below is wrong, it follows that the trial court did not err when it sustained the demurrer to the plea in abatement. The trial judge stated his reasons for sustaining the demurrer, and we here copy same:

"If Order No. 18, issued by the Director General of Railroads, is a valid exercise of power vested in him, the plea in abatement of this action is good. The order manifestly was intended to, and does, limit the right to maintain the action at this time to the District where the injury occurs, or the district of plaintiff's residence, where there are more than one district with the jurisdiction of the particular court; limiting the venue to the place of jurisdiction of the injury, or the place of jurisdiction of plaintiff's residence.

"The first clause of Section 10 of the Act of Congress of March 21, 1918, granting Federal Control of railroads, relates to liability, and the words therein "or with any order of the President' refers to orders governing rates, fares, classification, operation and the general

mangement of railroads and their business, and are powers that may be and are delegated to the President by the Federal Control Act, and for damages arising by reason of a compliance with such orders, no right of action can be maintained.

"The second clause of Section 10 of this Act provides:

"Actions at law or suits in equity may be brought by and against such carriers and judgment rendered as now provided by law.' The act clearly providing by said clause that actions at law may be brought against carriers as now provided by law, was intended to, and does, leave the venue of suits and the jurisdiction of courts as they were at the time of the passage of the Act.

32 "Order No. 18 undertakes to modify and limit the scope of this jurisdictional provision of Congress, and is the exercise of a power that is not, and that probably could not be, delegated by Congress. Art. 1, Sec. 1, Con. U. S.

"Where there is a showing that the trial would seriously interfere with the operation of the road, or in any wise interrupt the operation of trains engaged in hauling war material, troops, munitions or supplies, or in any — prejudice the government in the prosecution of the war, no right-thinking Court would hesitate to grant a continuance during the period of such condition.

W. H. POTTER.
Judge."

Section 10 of the Act of Congress contains all the law pertinent to this case, and we copy same, viz.:

"Sec. 10. That carriers while under Federal control shall be subject to all laws and liabilities as common carriers, whether arising under State or Federal laws or at common law, except in so far as may be inconsistent with the provisions of this Act or any other Act applicable to such Federal control or with any order of the President. Actions at law or suits in equity may be brought by and against such carriers and judgments rendered as now provided by law; and in any action at law or suit in equity against the carrier, no defense shall be made thereto upon the ground that the carrier is an instrumentality or agency of the Federal Government."

It seems clear to us that Congress did not delegate to the Executive the power claimed by appellant, but in apt language left the law as it was before the passage of the statute.

Affirmed.

Endorsed: Filed April 12, 1920. W. J. Buck, Clerk, by W. J. Brown, D. C.

33 In the Supreme Court of Mississippi.

No. 21013.

ALABAMA & VICKSBURG RAILWAY COMPANY, Appellant,

v.

SMITH JOURNEY, Appellee.

Petition for Writ of Error to the Supreme Court of the United States.

To the Honorable Sidney Smith,
Chief Justice of the Supreme Court of Mississippi:

Your petitioners, the Alabama & Vicksburg Railway Company and The United States Fidelity & Guaranty Company, present this their petition for a writ of error to the Supreme Court of the United States in the above entitled cause, and respectfully show that, on the 12th day of April, 1920, the Supreme Court of the State of Mississippi, the highest court of the state in which a decision in said suit, or any other, can be had, rendered a final judgment for the principal sum of ($5,000.00) Five Thousand Dollars, adding thereto ($250.00) Two Hundred and Fifty Dollars, the statutory penalty of five per centum, and six per centum per annum interest on the principal from September 2, 1919, until April 12, 1920, and costs, in favor of Smith Journey, the appellee in said case, and against the Alabama & Vicksburg Railway Company, the appellant in said cause and, as well, against petitioner the United States Fidelity & Guaranty Company, the surety of said Railway Company on its appeal bond by which the case was appealed from the trial court to the Supreme Court of Mississippi, and by its aforesaid final judgment the Supreme Court of Mississippi awarded execution thereon for the full amount of said judgment against your petitioners in the above entitled cause wherein the said Smith Journey was plaintiff and your petitioner the Alabama & Vicksburg Railway Company was defendant and your petitioner the
34 United States Fidelity & Guaranty Company was surety as aforesaid.

Your petitioners claim the right to remove said suit and said judgment to the Supreme Court of the United States by a writ of error under the Federal Judiciary Act, Vol. 36, United States Statutes at Large, page 1156 section 2372, because in said case, the validity of the general orders of the United States Director General of Railroads, designated as General Order 18 and General Order 18.1, issued by W. G. McAdoo, Director General of Railroads, April 9, 1918, and April 18, 1918, respectively, and the Supreme Court of Mississippi by its said judgment, we respectfully submit, denied petitioners their rights, privileges and immunities under said general orders, in this: it failed and declined to hold that it was error, prejudicial to petitioner Alabama & Vicksburg Railway Company, for the trial court to have sustained the plaintiff's de-

murrer to said petitioners' plea in abatement filed and presented in said court.

That this specification of error may the more readily be comprehended, petitioners further state the following facts, shown of record:

This suit was instituted in the trial court, a court having no territorial jurisdiction of the cause of action sued upon if the aforementioned orders of the Director General be valid and controlling on the courts of this state; it was instituted April 30, 1918, after the issuance and promulgation of both of the aforesaid General Orders 18 and 184, and after they, if valid, were in full force and effect.

To the declaration in this cause the defendant, Alabama & Vicksburg Railway Company plead in abatement, making said orders exhibits to and a part of said plea, in words and figures following:

35 "In the Circuit Court, Second District of Hinds County, Mississippi.

No. 2922.

S. K. JOURNEY

v.

VS.

ALABAMA & VICKSBURG RAILWAY COMPANY.

Plea in Abatement.

"The defendant, pleading in statement, shows that this court is without jurisdiction of this cause and without territorial jurisdiction of this defendant, because:

"This defendant is and has been for many years past a railroad corporation and until, to wit: the 30th day of December, A. D. 1917, was a common carrier of freights and passengers, and its entire lines of railroad tracks were and are in the United States of America; that on the day and date last mentioned, without defendant's consent or connivance and against its will, the United States Government, by its officers and agents, and under authority of the laws of the United States, took over defendant's entire line of railway and all of defendant's properties, not only its railway tracks, but its engines, locomotives, cars and other property used or capable of being used in the business of a railroad or in the business of a carrier, and since said date the United States Government has continuously and exclusively controlled and operated defendant's railroad and its said property and is now operating and controlling the same; and from said date until now has excluded defendant from operating or controlling the same or any part thereof.

"Defendant further shows that the plaintiff in this suit at the time his alleged cause of action accrued was not a resident of Hinds county, Mississippi, nor of the second circuit court district thereof, nor did he reside within the territorial jurisdiction of this court; on the contrary he was at said time a resident citizen of Attala county,

Mississippi, without the territorial jurisdiction of this court; and the pretended cause of action pleaded in the declaration did not arise in the second circuit court district of Hinds county, Mississippi, but arose, if at all, in Jackson, and within the first circuit court
36 district of said Hinds county, and without the territorial jurisdiction of this court; and the injuries charged in the declaration to have been suffered by plaintiff, for which he sues, were not suffered by him in the second circuit court district of said county, nor within the territorial jurisdiction of this court, but were suffered by him, if at all, without the territorial jurisdiction of this court, and within the first circuit court district of said Hinds county.

"This suit was instituted and begun in this court and process therein issued on to wit: the 30th day of April, A. D., 1918, after the United States Government had taken over and was in control of defendant's railway line and tracks and all of its property hereinbefore mentioned, and after the issuance and promulgation of the order made and promulgated by W. G. McAdoo, the Director General of Railroads hereinafter mentioned, pleaded and exhibited herewith as a part of this plea.

"On the 9th day of April, 1918, the United States Government, acting in pursuance of law, by W. G. McAdoo, an officer of said government, its Director General of Railroads, issued and promulgated an order, numbered 18, having the force and effect of law, amended April 9, 1918, by general order of said Director General of Railroads, numbered 18A; the order as amended prohibiting and prohibited the institution of suits against carriers, including railroads and including the defendant railroad or railway, *way*, in courts other than those of the county or district where the plaintiff resided at the time of the accrual of the cause of action sued upon, or in the county or district where the cause of action sued upon, of said order, No. 18, as amended by order No. 18A, is hereto attached and herewith filed and made a part of this plea.

"Wherefore, defendant avers that this suit was unlawfully instituted in this court and defendant, therefore, prays that it shall not be required to make other or further plea in this behalf and
37 that this suit shall be abated and defendant hence discharged.

R. H. & J. H. THOMPSON,
Defendant's Attorneys.

"Filed August 22d, 1918. E. D. Fondren, Clerk.

"STATE OF MISSISSIPPI,
County of Hinds,
City of Jackson:

"Personally came and appeared before the undersigned, a Notary Public in and for said city, county and State, R. H. Thompson, who being duly sworn says on oath, he is an agent and attorney of the Alabama & Vicksburg Railway Company charged with the defense of this suit, and that the matters of fact stated in the above and foregoing plea are true and correct as therein stated.

R. H. THOMPSON.

"Sworn to and subscribed before me this the 21st day of August, 1918. In witness whereof I have hereunto subscribed my name and affixed my official seal, on the day and date herein last written.

J. H. THOMPSON,
[SEAL.] *Notary Public.*"

"United States Railroad Administration.

Office of the Director General.

Washington, April 9, 1918.

"*General Order No.* 18.

"Whereas the Act of Congress approved March 21, 1918, entitled 'An Act to Provide for the Operation of Transportation System While Under Federal Control,' provides (Section 10) 'That carriers while under Federal control shall be subject to all laws and liabilities as common carriers, whether arising under State or Federal laws or at common law, except insofar as may be inconsistent with the provisions of this Act or with any order of the President * * *
But no process, mesne or final, shall be levied against any
38 property under such Federal control;' and

"Whereas it appears that suits against the carriers for personal injuries, freight and damage claims, are being brought in States and jurisdictions far remote from the place where plaintiffs reside or where the cause of action arose; the effect thereof being that men operating the trains engaged in hauling war materials, troops, munitions or supplies, are required to leave their trains and attend court as witnesses, and travel sometimes for hundreds of miles from their work, necessitating absence from their trains for days and sometimes for a week or more; which practice is highly prejudicial to the just interests of the government and seriously interfer-s with the physical operation of the railroads; and the practice of suing in remote jurisdictions is not necessary for the protection of the rights or the just interests of plaintiffs.

"It is therefore ordered, That all suits against carriers while under Federal control must be brought in the county or district where the plaintiff resides, or in the county or district where the cause of action arose.

W. G. McADOO,
Director General of Railroads."

"United States Railroad Administration.

Office of the Director General.

Washington.

April 18, 1918.

"*General Order No.* 18A.

"General Order No. 18 issued April 9, 1918, is hereby amended to read as follows:

"It is therefore ordered that all suits against carriers while under Federal control must be brought in the county or district where the plaintiff resided at the time of the accrual of the cause of action or in the county or district where the cause of action arose.'

W. G. McADOO,
Director General of Railroads."

39 The plaintiff in said suit, Smith Journey, demurred to said plea, and upon hearing the demurrer the trial court rendered judgment in these words:

"*Judgment Sustaining Demurrer.*

"S. K. JOURNEY

vs.

ALABAMA & VICKSBURG RAILWAY COMPANY.

"This cause was heard and considered before the Judge in vacation by consent of parties, on the demurrer of the plaintiff to the defendant's plea in abatement and the court being of opinion that the order of the United States Director General of Railroads pleaded was and is unauthorized by law, wherefore said demurrer is here now and hereby sustained and the plea in abatement adjudged insufficient. The defendant at once upon the announcement by the judge of his ruling on said demurrer excepted to the ruling of the court and said exception was and is duly allowed and this order is to be treated as if a formal bill of exception showing that defendant immediately and seasonably excepted as above stated.

"The defendant is granted leave to plead further within ten days after the entry of this order on the minutes of the court. And the Clerk of the Circuit Court of Hinds County, Mississippi, Second District of said County, is directed to enter this judgment on the minutes of the court as a vacation judgment.

"Ordered this September 4th, 1918.

W. G. POTTER,
Judge."

It will be observed from the judgment itself, (*a*) that the court adjudged as a matter of law that said orders of the Director General of Railroads was and are unauthorized by law, and (*b*) that the defendant, the Railway Company duly excepted to the ruling.

When the case reached the Supreme Court of Mississippi on appeal the ruling of the trial court, sustaining the plaintiff's demurrer to the aforesaid plea was duly assigned as error; and the validity
40 of the said general orders of the Director General of Railroads was elaborately, earnestly and fully argued and urged upon the said Supreme Court of Mississippi, but, nevertheless, the said Supreme Court of Mississippi, decided against the contention of the said Alabama & Vicksburg Railway Company and affirmed the judgment of the trial court holding said orders of the United States Di-

rector General of Railroads to be and to have been "unauthorized by law"; the Supreme Court of Mississippi in so deciding announced in its written opinion as follows:

"The question raised by the plea in abatement is of some interest, and we have decided to express our views thereon. The concrete question is about this: 'Did Congress confer upon the President of the United States or the Director of Railroads the power to fix the venue of actions against the railroads, while the same were under Federal Control?' This question is pertinent here because the plea in abatement is based upon the assumption that Congress did delegate to the Executive this power. If the defendant below is wrong, it follows that the trial court did not err when it sustained the demurrer to the plea in abatement. The trial judge stated his reasons for sustaining the demurrer, and we here copy same:

'If Order No. 18, issued by the Director General of Railroads, is a valid exercise of power vested in him, the plea in abatement in this action is good. The order manifestly was intended to, and does limit the right to maintain the action at this time to the District where the injury occurs, or the District of Plaintiff's residence, where there are more than one district within the jurisdiction of the particular Court; limiting the venue to the place of the jurisdiction of the injury, or the place of jurisdiction plaintiff's residence.'"

Petitioners contend, are advised and insist that the said judgment of the Supreme Court of Mississippi denied petitioners their rights and privileges under the laws of the United States, the laws under
41 which the United States Government took possession and control of the railroads of the country, including the Alabama & Vicksburg Railroad, and operated them from December 31, 1917, until March 1, 1920, said orders 18 and 18A, issued and promulgated by the Director General of Railroads being of said laws and being valid and enforcible as such.

Wherefore, petitioners pray the allowance of a writ of error, with supersedeas returnable in the Supreme Court of the United States, and for citation and supersedeas, and to that end they present herewith an assignment of error to be presented and argued in the Supreme Court of the United States, and as well for approval a good and sufficient writ of error supersedeas bond in ample penalty, with sufficient surety, conditioned as required by law.

And as in duty bound petitioners will ever pray.

ALABAMA & VICKSBURG RAILWAY COMPANY,

By ROBERT H. THOMPSON,
Its Attorney of Record.

UNITED STATES FIDELITY & GUARANTY CO.,

By ROBERT H. THOMPSON,
Its Attorney of Record.

ROBERT H. THOMPSON,
Petitioners' Attorney.

Petition for writ of error allowed and writ granted as prayed. April 20, 1920.

SYDNEY SMITH,
Chief Justice of the Supreme Court of Mississippi.

[Endorsed:] 21013. Alabama & Vicksburg Ry. Co. v. Smith Journey. Petition for Writ of Error to United States Supreme Court. Received & Filed Apr. 20, 1920. W. J. Bush, Clerk, by W. J. Brown, D. C. Robert H. Thompson.

42 *Writ of Error Bond.*

THE UNITED STATES OF AMERICA,
State of Mississippi,
County of Hinds:

Know all men by these presents, that we, the Alabama & Vicksburg Railway Company and the United States Fidelity & Guaranty Company, as principals, and the Fidelity & Deposit Company of Maryland, a surety company authorized by the laws of the United States and the statutes of the State of Mississippi to become surety upon appeal bonds, as surety, are held and firmly bound unto Smith Journey in the penal sum of ($6,600.00) Six Thousand Six Hundred Dollars, to be paid to the said Smith Journey, his heirs, executors, administrators and assigns, for the payment of which well and truly to be made, we bind ourselves and our successors, jointly and severally, firmly by these presents.

Sealed with our seals and dated this the 20th day of April, 1920.

The condition of this obligation is such that, whereas the above named obligors, plaintiffs in error, the Alabama & Vicksburg Railway Company and the United States Fidelity & Guaranty Company, hath prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment against them in the Supreme Court of Mississippi in case therein numbered 21,013 on the dockets and records of the last mentioned court, wherein Smith Journey was the plaintiff and appellee and the said Alabama & Vicksburg Railway Company, one of the principal obligors herein, was the defendant and the appellant, and the United States Fidelity & Guaranty Company, the other principal obligor herein, was the surety on the appeal bond of the Alabama & Vicksburg Railway Company by which the case was carried from the state trial court to the state Supreme Court and the judgment of the said state Supreme Court was and is a joint final judgment against both of the principal obligors
43 herein.

Now, therefore, if the above named plaintiffs in error, the principal obligors in this bond, the Alabama & Vicksburg Railway Company, and the United States Fidelity & Guaranty Company, shall prosecute the said writ of error to effect and answer all costs and

damages, if they shall fail to make good their plea, then this obligation shall be void, otherwise it shall remain in full force and effect.

ALABAMA & VICKSBURG RAILWAY COMPANY,
Principal.
By ROBERT H. THOMPSON,
Its Attorney of Record.
UNITED STATES FIDELITY & GUARANTY COMPANY,
Principal.
By ROBERT H. THOMPSON,
Its Attorney of Record.
FIDELITY & DEPOSIT CO. OF MARYLAND,
Surety.
J. C. HOOD,
Att'y.

The above bond and surety approved this the 1 day of April, 1920, the same to operate as a supersedeas.

SYDNEY SMITH,
Chief Justice of the Supreme Court of Mississippi.

[Seal Fidelity & Deposit Company of Maryland, Incorporated 1890.]

[Endorsed:] 21013. Alabama & Vicksburg Ry. Co. v. Smith Journey. Writ of Error Bond to United States Supreme Court. Received & Filed Apr. 20, 1920. W. J. Bush, Clerk, by W. J. Brown, D. C.

44 *Assignments of Error.*

In the Supreme Court of the United States.

B. No. —.

ALABAMA & VICKSBURG RAILWAY COMPANY and UNITED STATES FIDELITY & GUARANTY COMPANY, Plaintiffs in Error,

v.

SMITH JOURNEY, Defendant in Error.

The plaintiffs in error, Alabama & Vicksburg Railway Company and United States Fidelity & Guaranty Company, show to the court that there are manifest errors prejudicial to them, apparent of record in the proceedings, decisions and final judgment of the Supreme Court of the State of Mississippi in the above entitled matter and case, in this:

First. The Supreme Court of Mississippi erred in deciding that the General Orders, No. 18 and No. 18A, issued and promulgated by the Director General of Railroads, April 9, 1918, and April 18,

1918, respectively, before the beginning of this suit, April 30, 1918, were authorized by law.

Second. The Supreme Court of Mississippi erred in affirming the judgment of the trial court sustaining the demurrer of the plaintiff therein, the defendant in error, to the plea in abatement of the defendant, the plaintiff in error.

Third. The Supreme Court of Mississippi erred in denying the plaintiffs in error their rights under the act of Congress, known as the Federal Control Act, under which the railroad of the Alabama & Vicksburg Railway Company was taken over December 31, 1917, and operated by the United States Government from that date continuously until March 1, 1920, and under the aforesaid General Orders of the Director General of Railroads, and said acts of Congress were erroneously construed and said orders erroneously held to be void as unwarranted in law.

45 Wherefore, the plaintiffs in error pray a reversal of the final judgment of the Supreme Court of Mississippi in this cause, directing a dismissal of the suit. If, however, this court shall adjudge that the record does not warrant a dismissal of the suit, then plaintiffs in error pray for the reversal of the judgment of the Supreme Court of Mississippi and for such other relief as may be meet and proper.

And as in duty bound plaintiffs in error will ever pray.

ROBERT H. THOMPSON,
Attorneys for Plaintiffs in Error.

[Endorsed:] 21013. Alabama & Vicksburg Ry. Co. v. Smith Journey. Assignments of Error for United States Supreme Court. Received & Filed Apr. 20, 1920. W. J. Bush, Clerk, by W. J. Brown, D. C.

46 THE UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the Supreme Court of Mississippi, Greeting:

Because in the record and proceedings and also in the renditions of judgments of a plea which is in the Supreme Court of Mississippi before you, or some of you, being the highest court of law or equity of the said state in which a decision could be had in said state between Smith Journey, the plaintiff in the court of original jurisdiction, and the Alabama & Vicksburg Railway Company, the defendant in said court, and the United States Fidelity & Guaranty Company, surety on the appeal bond given by the said Alabama & Vicksburg Railway Company to appeal said cause from the court of original jurisdiction to the Supreme Court of Mississippi, decided by the Supreme Court of Mississippi against the Alabama & Vicksburg Railway Company, and the said surety on its bond, wherein was drawn in question in said suit the validity of the laws of the United States and the proper construction of the acts of Congress under which the United States Government took control of the railroads of

the country, embracing the Alabama & Vicksburg Railroad, on the 31st of December, 1917, and controlled and managed the same until the first of March, 1920, and of certain orders of the Director General of Railroads designated as Orders Nos. 18 and 18A, respectively, and in said cause the Supreme Court of Mississippi is represented to have denied the Alabama & Vicksburg Railway Company and its co-plaintiff in error their rights under said Federal statutes and said orders of the Director General.

We, being willing for the error, if any hath been committed, to be duly corrected and full and speedy justice done to the parties in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly you send the record and proceedings aforesaid, with all things concerning the same, to

47 the Supreme Court of the United States, together with this writ, so that you may have the same in the said Supreme Court at Washington within thirty days from the date hereof so that the record and proceedings aforesaid being inspected, the said Supreme Court of the United States may cause further to be done therein, to correct that error, what of right, according to the laws and customs of the United States, should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the 20th day of April, in the Year of our Lord, One Thousand Nine Hundred and Twenty.

[Seal U. S. District Court, Southern District of Mississippi.]

JAEN THOMPSON,
Clerk of the United States District Court
for the Southern District of Mississippi.

Allowed to operate as a supersedeas of the judgment of the circuit court and of the Supreme Court of Mississippi.

SYDNEY SMITH,
Chief Justice of the Supreme Court of Mississippi.

[Endorsed:] 21013. Alabama & Vicksburg Ry. Co. v. Smith Journey. Writ of Error to United States Supreme Court. Filed April 20, 1920. W. J. Buck, Clerk.

48 THE UNITED STATES OF AMERICA, *ss:*

To Smith Journey, Greeting:

You are hereby cited and admonished to be and appear at a term of the Supreme Court of the United States, at Washington City, within thirty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the Supreme Court of Mississippi, wherein the Alabama & Vicksburg Railway Company and the United States Fidelity & Guaranty Company are plaintiffs in error and you are a defendant in error, to show cause, if any there be, why the judgment against the said plaintiffs in error, as in the said writ of error mentioned, shall not be corrected and why a speedy justice should not be done to the parties in that behalf.

Witness the Honorable Sydney Smith, Chief Justice of the Supreme Court of Mississippi, this the 20th day of April, in the year of our Lord, One Thousand, Nine Hundred Twenty.

SYDNEY SMITH,
Chief Justice of the Supreme Court of the State of Mississippi.

STATE OF MISSISSIPPI,
County of Hinds, City of Jackson:

On this the 20th day of April, 1920, personally appeared before me, a Notary Public in and for said city, county and state, A. Hemingway who makes oath and says that she delivered a true copy of the above and foregoing citation to Chalmers Potter, one of the attorneys of record for Smith Journey, the defendant in error mentioned in said citation on the 20th day of April, 1920.

A. HEMINGWAY.

Sworn to and subscribed before me this the 20th day of April, 1920, as witness my hand and official seal.

[Seal Fulton Thompson, Notary Public, Jackson, Mississippi.]

FULTON THOMPSON,
Notary Public.

Filed April 20th, 1920.

[Seal U. S. District Court, Southern District of Mississippi.]

JAEN THOMPSON,
Clerk U. S. District Court in and for the Southern District of Mississippi, Jackson.

[Endorsed:] 21013. Alabama & Vicksburg Ry. Co. v. Smith Journey. Citation to Supreme Court of the United States. Filed April 20, 1920. W. J. Buck, Clerk.

49 In the Supreme Court of Mississippi.

No. 21013.

ALABAMA & VICKSBURG RAILWAY COMPANY, Appellant,
v.
SMITH JOURNEY, Appellee.

To the Honorable Wm. J. Buck,
Clerk of the Supreme Court of Mississippi:

The Alabama & Vicksburg Railway Company, the appellant in the above entitled case, recently decided by the Supreme Court of Mississippi, and the United States Fidelity & Guaranty Company, surety on its appeal bond, feeling aggrieved by the judgment of the

Supreme Court of Mississippi rendered against them, have petitioned for and obtained a writ of error by which the final judgment of the Supreme Court of Mississippi in this case will be reviewed by the United States Supreme Court and they will apply to the Supreme Court of the United States for a certiorari to the Supreme Court of Mississippi in order to obtain a review by the National Supreme Court of the said judgment of the Supreme Court of Mississippi.

Now, therefore, in consideration of the premises, you are requested to speedily and within thirty days from this date make up and forward to the clerk of the Supreme Court of the United States a transcript of the record in this case for the Supreme Court of the United States. However, it is believed that large parts of the record of the Supreme Court of Mississippi are unnecessary to be certified to the Supreme Court of the United States. Accordingly, under Rule 8 of the Rules of the Supreme Court of the United States, this praecipe is presented and you are requested to file same and make it a part of the record of this cause.

The undersigned, the attorneys for the appellants, against whom the judgment of the Supreme Court of Mississippi was ren-
50 dered, suggest and indicate that you omit from the transcript of the record to be prepared by you for the Supreme Court of the United States:

(*a*) All the testimony and evidence introduced on the trial in the circuit court of Hinds county;

(*b*) All the instructions asked by either party in the said circuit court, both those given and those refused.

This you will do unless the plaintiff in said cause, the appellee in the Supreme Court of Mississippi, Smith Journey, by his attorneys within the time prescribed by Rule 8 aforesaid, shall file his praecipe with you, demanding that the parts of the record we have requested to be omitted from the transcript, or some part thereof, shall be incorporated in the transcript of the record to be made by you for the Supreme Court of the United States.

Respectfully submitted,

ALABAMA & VICKSBURG RAILWAY COMPANY, AND
UNITED STATES FIDELITY & GUARANTY COMPANY,
By ROBERT H. THOMPSON,
Their Attorney of Record.

The above and foregoing written praecipe has been exhibited to and a copy thereof delivered to us, and we acknowledge its service this April 20th, 1920.

TEAT & POTTER,
Attorneys for Smith Journey, Appellee in the Foregoing Entitled Case.

[Endorsed:] 21013. Alabama & Vicksburg Ry. Co. v. Smith Journey. Praecipe. Filed April 20, 1920. W. J. Buck, Clerk.

51 STATE OF MISSISSIPPI,
Hinds County:

I, W. J. Buck, Clerk of the Supreme Court of the State of Mississippi, being the Court of said State, which has highest, last and final jurisdiction of all pleas and causes pending in the Courts of said State, do hereby certify that the foregoing are full, true and correct copies of all the papers, each and all of them constituting the record in the said Supreme Court of the State of Mississippi in the case of Alabama & Vicksburg Railway Co. vs. Smith Journey, No. 21,013 on the docket of said court, all of which are now on file in my office except such as are designated by the praecipe filed with me, to be omitted from the record on writ of error to the Supreme Court of the United States and I further certify that Messrs. Teat & Teat, attorneys for appellee in error do not desire to file a praecipe asking that any other portions of said record in the Supreme Court of Mississippi be embraced in the record. I further certify that the original papers, to-wit, Petition for Writ of Error to United States Supreme Court, Writ of Error Bond, Assignments of Error, Writ of Error to the United States Supreme Court, Citation to Supreme Court of the United States and Praecipe were duly filed in my office on the date borne on the back thereof.

Given under my hand with the seal of said court affixed at office in the City of Jackson, Mississippi, this the 22nd day of April, A. D. 1920.

[Seal State of Mississippi Supreme Court.]

W. J. BUCK,
Clerk of the Supreme Court of Mississippi.

Cost of transcript, paid by Appellant in error $26.25.

W. J. BUCK,
Clerk.

Endorsed on cover: File No. 27,684. Mississippi Supreme Court, Term No. 929. Alabama & Vicksburg Railway Company and United States Fidelity & Guaranty Company, plaintiffs in error, vs. Smith Journey. Filed May 14th, 1920. File No. 27,684.

Office Supreme Court, U
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JAMES D. MAHER
CLERK

No. 929 380

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 19[illegible]

ALABAMA & VICKSBURG RAILWAY CO., ET AL.,
Petitioners,

versus

SMITH JOURNEY,
Defendant.

Petition, Notice and Motion for Writ of Certiorari to the Supreme Court of the State of Mississippi.

Alabama & Vicksburg Railway Company, and United States Fidelity & Guaranty Company, Petitioners.

J. BLANC MONROE,
MONTE M. LEMANN,
R. H. THOMPSON,
Counsel for Petitioners.

May, 1920.

Montgomery-Andree Ptg. Co., Inc. 307 Chartres, New Orleans.

IN THE
UNITED STATES SUPREME COURT
OCTOBER TERM, 1919.

ALABAMA & VICKSBURG RAILWAY CO., ET AL.,
Petitioners,

versus

SMITH JOURNEY,
Defendant.

To: Smith Journey, Defendant in Error, or Messrs. Teat, Teat & Potter, his Attorneys of Record:

This is to notify you, that plaintiffs in error and petitioners will, on the 1st day of June, 1920, present to the Supreme Court of the United States, in its court room at Washington, D. C., its motion for a writ of *certiorari* upon its verified petition and a copy of the entire record in this case. A copy of the said motion and of the said petition and of the brief accompanying said petition, are delivered to you herewith, this 12th day of May, 1920.

ALABAMA & VICKSBURG RAILWAY CO.
UNITED STATES FIDELITY & GUARANTY CO.

By J. BLANC MONROE,
MONTE M. LEMANN,
R. H. THOMPSON,
Of Counsel.

The foregoing notice and delivery of a copy thereof and of the motion and petition for writ of *certiorari* and brief are hereby acknowledged, this day of May, 1920.

.....
Attorneys for Defendant.

IN THE

UNITED STATES SUPREME COURT

OCTOBER TERM, 1919.

ALABAMA & VICKSBURG RAILWAY CO., ET AL.,
Petitioners,

versus

SMITH JOURNEY,
Defendant.

Motion for Writ of Certiorari to the Supreme Court of the State of Mississippi.

Now comes the Alabama & Vicksburg Railway Company and the United States Fidelity & Guaranty Company, petitioners, by their counsel and move this Honorable Court that it will, by *certiorari* or other proper process directed to the Honorable the Judges of the Supreme Court of the State of Mississippi, require said Court to certify to this Court, for its review and determination, a certain cause in the said Supreme Court of Mississippi lately pending, wherein petitioner, Alabama & Vicksburg Railway Company, was appellant, and the said Smith Journey was appellee, and to that end it now tenders herewith its petition and brief, with a certified copy of the entire record in said cause in said Supreme Court of Mississippi.

J. BLANC MONROE,
MONTE M. LEMANN,
R. H. THOMPSON,
Counsel for Petitioner.

IN THE

UNITED STATES SUPREME COURT

OCTOBER TERM, 1919.

ALABAMA & VICKSBURG RAILWAY CO., ET AL.,

Petitioners,

versus

SMITH JOURNEY,

Defendant.

Petition for Writ of Certiorari to the Supreme Court of the State of Mississippi.

To the Honorable the Supreme Court of the United States:

The petition of the Alabama & Vicksburg Railway Company, plaintiff in error, and of the United States Fidelity & Guaranty Company, surety on its appeal bond in the Supreme Court of Mississippi, respectfully shows to this Honorable Court that on April 30, 1918, while this country was at war and while petitioner and other interstate carriers were under the control of the President of the United States, by virtue of the Act of Congress known as the Federal Control Act, approved March 21, 1918, one Smith Journey, a then resident of Attala County, Miss., instituted a suit for damages for personal injuries, against petitioner, the Alabama & Vicksburg Railway Company; that the said suit was filed not in Attala County, where the plaintiff resided, and not in the first (State) Circuit Court of Hinds County,

Mississippi, the Court having jurisdiction of the place where the injury was alleged to have been sustained but in another and different court, namely, the Second Circuit Court of Hinds County, Miss., which said Court was neither the Court of the plaintiff's domicile, nor the Court having jurisdiction of the place where the accident happened. That the defendant, by timely pleadings, properly filed, objected to the jurisdiction of said Court on the grounds that:

a. The railroads, including your petitioner, had as a war measure, been taken under control by the Federal Government.

b. That the said control was authorized by the Act of Congress known as the Federal Control Act, approved March 21, 1918, and that the said act provided in part:

> "Sec. 10. That carriers while under Federal control shall be subject to all laws and liabilities as common carriers, whether arising under State or Federal laws, or at common law, except in so far as may be inconsistent with the provisions of this Act or any other Act applicable to such Federal control, or with any order of the President. Actions at law or suits in equity may be brought by and against such carriers and judgments rendered as now provided by law; and in any action at law or suit in equity against the carrier, no defense shall be made thereto upon the ground that the carrier is an instrumentality or agency of the Federal Government. Nor shall any such carrier be entitled to have transferred to a Federal Court any action hereto-

fore or hereafter instituted by or against it, which action was not so transferable prior to the Federal control of such carrier; and any action which has heretofore been so transferred because of such Federal Control or of any Act of Congress, or official order or proclamation relating thereto, shall, upon motion of either party, be retransferred to the Court in which it was originally instituted. But no process, *mesne* or final, shall be levied against any property under such Federal control."

Sec. 9, in part, provides:

"And the President, in addition to the powers conferred by this act, shall have and is hereby given such other and further powers necessary or appropriate to give effect to the powers herein and heretofore conferred."

c. That, acting under the authority thus vested in him, the President, through his duly authorized representative, the Director General of Railroads, had prior to the institution of said suit, issued and promulgated his Orders Nos. 18 and 18a, reading as follows:

"U. S. RAILROAD ADMINISTRATION.

Office of the Director General, Washington.

April 9, 1918.

General Order No. 18.

"Whereas, the Act of Congress approved March 21, 1918, entitled, 'An act to provide for the opera-

tion of transportation systems while under Federal control,' provides (section 10) 'that carriers while under Federal control shall be subject to all laws and liabilities as common carriers, whether arising under State or Federal laws, or at common law, except in so far as may be inconsistent with the provisions of this act or with any order of the President. * * * But no process, mesne or final, shall be levied against any property under such Federal control; and,

"Whereas, it appears that suits against the carriers for personal injuries, freight and damage claims, are being brought in states and jurisdictions far remote from the place where plaintiffs reside or where the cause of action arose, the effect thereof being that men operating the trains engaged in hauling war materials, troops, munitions, or supplies, are required to leave their trains and attend court as witnesses, and travel sometimes for hundreds of miles from their work, necessitating absence from their trains for days and sometimes for a week or more, which practice is highly prejudicial to the just interests of the government and seriously interferes with the physical operation of the railroads, and the practice of suing in remote jurisdictions is not necessary for the protection of the rights or the just interests of plaintiffs;

"It is, therefore, ordered that all suits against carriers while under Federal control must be brought in the county or district where the plaintiff resides, or in the county or district where the cause of action arose.

"W. G. McADOO,
Director General of
Railroads."

"U. S. RAILROAD ADMINISTRATION.

Office of the Director General, Washington.

April 18, 1918.

General Order No. 18a.

"General Order No. 18, issued April 9, 1918, is hereby amended to read as follows:

"It is therefore ordered that all suits against carriers while under Federal control must be brought in the county or district where the plaintiff resided at the time of the accrual of the cause of action or in the county or district where the cause of action arose.

"W. G. McADOO,
Director General of
Railroads."

d. That as this suit was a suit against a carrier for damages for personal injuries, it could not be brought in the Circuit Court of the Second District of Hinds County, Miss., since that Court was neither the Court of the district where the plaintiff resided nor of the district where the supposed cause of action arose.

This objection to the jurisdiction or plea in abatement, was not a mere technical objection, it was made in good faith because of the inconvenience and detriment to the service resultant from having to transport witnesses to a point off the line of railroad and also because the jurisdiction selected by plaintiff was notoriously hostile to interstate carriers.

The objection to the jurisdiction (or plea in abatement) was demurred to by the plaintiff, on the following grounds:

"1. That the said plea in abatement is wholly insufficient in law.

"2. That said plea in abatement is without authority of law.

"3. That said plea in abatement pleads an order of the Director General of Railroads, which order of said Director General is not law and not binding upon plaintiff.

"4. That said order of said Director General is in conflict with the Constitution of the United States in that it undertakes to deny the plaintiff a trial of his cause in a Court of competent jurisdiction.

"5. Because the Act of Congress of March 21, 1918, does not give authority to the Director General of Railroads to limit the jurisdiction of the cause of action in the above styled suit.

"6. Because said plea is in violation of the said Act of Congress and is without authority of law and contrary to the law."

The Judge of first instance, sustained this demurrer and overruled defendant's objection to the jurisdiction (plea in abatement), saying in part:

"If Order No. 18, issued by the Director General of Railroads, is a valid exercise of power vested in him, the plea in abatement of this action is good. The order manifestly was intended to, and does, limit the right to maintain the action at this time to

> the district where the injury occurs, or the district of plaintiff's residence, where there are more than one district with the jurisdiction of the particular Court; limiting the venue to the place of jurisdiction of the injury, or the place of jurisdiction of plaintiff's residence."

And then proceeded to hold that the Act of Congress gave to the President or his representative, the Director General, no power to make Orders Nos. 18 and 18a.

The defendant carrier, by timely action, reserved its rights under the Constitution and laws of the United States, and as it was forced to do, went into the trial of the case.

The evidence showed that plaintiff's residence was in Attala County, Miss., and that the accident occurred in the jurisdiction of the First Circuit Court of Hinds County, Mississippi. The suit was not brought in either of these jurisdictions, so that, as the Judge correctly states, "if Order 18 is legal and binding, the plea in abatement was good." The evidence further shows that Journey, the plaintiff and appellee, at the time he suffered the injury for which he sues, October, 1917, was a soldier in the service of the United States Government, stationed at Vicksburg. A state fair was at the time being held at Jackson. The plaintiff, as he himself testified (Record, p. 63), for his own pleasure, came to Jackson to enjoy the fair. Seeking to return to Vicksburg, he sought transportation on a freight train of the railway company, which did not carry passengers and the servants of the company operating the same

were forbidden to allow persons to be carried on the train. The plaintiff averred in his declaration that the railway company, because the soldiers had before the time that he was injured been guarding some of its property, allowed soldiers to ride free on any and all of its trains, but this was denied and the proof was overwhelming to the contrary. It was testified that the soldiers rode freight trains in spite of the company's remonstrances and its ability to prevent them so doing. The plaintiff's own testimony on this subject was alone to the effect that the soldiers rode on freight trains; he did not testify that the company assented for them to take passage on its freight trains and he swore to nothing on this subject contradicting the fact, shown by other witnesses, that the soldiers rode freight trains in spite of the company's efforts to prevent them from so doing.

Plaintiff did not seek to board the train at a place where passengers were generally received. On the occasion when he suffered injuries, he went in the night time to a point in the company's yards, near the extreme limits of the City of Jackson, where an office was maintained by the railway for convenience in giving train operatives telegraphic orders and where trains were made up, and there remained, with a goodly number of soldiers, until the freight train upon which he sought to return to Vicksburg came into the company's private grounds and yards, and then endeavored to get upon it. The plaintiff testified, although he was overwhelmingly contradicted on this point, that he sought the conductor of the freight train and obtained his permission to get aboard of it. Why he should have sought permission, if, as he swore, the company willingly and habitually car-

ried soldiers free, is unexplained. The only explanation that can be given is that Journey sought to ride free by collusion with the conductor.

Plaintiff further testified that he got upon the ladder on the side of the freight car just as the train was starting and before he reached the top of the car he was carried into contact with a piece of lumber protruding from a car standing on a side track near its junction with the main line of the railroad, and was knocked off, falling in such a way as to receive the injury mentioned in the declaration. The plaintiff, as the Court will see, was most thoroughly discredited. His own statements of the facts of the case, made shortly after the accident, are wholly inconsistent with and contradict his testimony in every material particular. In fact, he was contradicted by every material witness who testified on the trial of the case. The conductor testified that he did not authorize the plaintiff to get upon the train and did not see him at all on the occasion of his injury. The other witnesses who had knowledge of the occurrences testified that no car upon the side track had a piece of timber protruding from it; that plaintiff endeavored to board the freight train while it was moving, that his foot slipped from the journal box or ladder on which he placed it for the purpose of climbing on the train, was by the slip protruded onto the rail of the track in front of the car's wheel and mashed, his toes being amputated. It was further shown that on several occasions before his injury the plaintiff had stated to soldiers, his associates, that he intended to get out of the army and, if necessary to do so, would lose an arm or leg.

Notwithstanding all this, the request of the defendants for peremptory instructions were refused, and the jury proceeded to award to the plaintiff five thousand dollars damages.

Defendant appealed to the Supreme Court of Mississippi and that tribunal affirmed the judgment, handing down an opinion, a copy of which is attached, in which it quoted with approval, the above quoted language of the Judge *a quo* to the effect that if Order 18 is valid, the plea in abatement was good, but held that Order 18 is invalid.

Defendant company sued out and lodged in this Court a writ of error with *supersedeas*, which is still pending under the title of *Alabama & Vicksburg Railway Company v. Smith Journey, No.*—, and now, out of a superabundance of caution, makes this its application for *certiorari*, alleging that its rights under the Constitution and laws of the United States have been violated and that it has been denied due process of law, and that the judgment of the Supreme Court of Mississippi, and of the Court of first instance, should be reversed, its plea in abatement sustained and the suit dismissed.

Wherefore, your petitioner respectfully prays that a writ of *certiorari* be issued under the seal of the Court, directed to the Supreme Court of Mississippi, sitting at Jackson, in said State, commanding the Court to certify and send to this Court on a day to be designated, a full and complete transcript of the record and all proceedings of said Court had in said cause, to the end that this cause may be reviewed and

determined by this Honorable Court, as provided by Section 237 of the Judicial Code, as amended, and that said judgment of the Supreme Court of Mississippi may be reversed by this Honorable Court; and for such further relief as may seem proper, and your petitioner will ever pray.

ALABAMA & VICKSBURG RAILWAY CO.
UNITED STATES FIDELITY & GUARANTY CO.

By J. BLANC MONROE,
MONTE M. LEMANN,
R. H. THOMPSON,
Of Counsel.

STATE OF LOUISIANA,
Parish of Orleans.

Before me, the undersigned authority, a Notary Public in and for the foregoing Parish and State, personally came and appeared **J. Blanc Monroe,** who being duly sworn, says that he is counsel for the petitioners herein; that he knows of the proceedings had and that the facts stated in the foregoing petition are true and correct to the best of his knowledge and belief.

Sworn to and subscribed before me this day of May, 1920.

.....

Office Supreme Court, U. S.
FILED
MAY 27 1920
JAMES D. MAHER,
CLERK.

No. 389

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1919.

ALABAMA & VICKSBURG RAILWAY COMPANY, ET AL.,

Petitioners,

versus

SMITH JOURNEY,

Defendant.

Original Brief in Support of Petition for Writ of Certiorari to the Supreme Court of the State of Mississippi.

J. BLANC MONROE,
MONTE M. LEMANN,
R. H. THOMPSON,
Counsel for Petitioner.

May, 1920.

Montgomery-Andree Ptg. Co., Inc. 307 Chartres, New Orleans.

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No.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1919.

ALABAMA & VICKSBURG RAILWAY COMPANY, ET AL.,

Petitioners,

versus

SMITH JOURNEY,

Defendant.

Original Brief in Support of Petition for Writ of Certiorari to the Supreme Court of the State of Mississippi.

SYLLABUS.

1. The enactment of the Federal Control Act was a valid exercise of the powers granted to Congress by the Constitution.

2. Under the Federal Control Act the President, or his duly constituted representative, the Director General of Railroads, was authorized to issue an order limiting the jurisdictions in which suits could be brought against

railroads during Federal control. To either: (a) The place where the accident occurred, (b) the place of the residence of the plaintiff.

3. In the present instance, although the suit was filed during the European war, while the roads were under Federal control, and after the issuance of such orders, the Courts of Mississippi have insisted upon trying this case in a jurisdiction other than the two mentioned, to the detriment of the carriers.

4. From superabundance of caution this case has been brought up by writ of error as well as *certiorari*.

If the Court Please:

The Supreme Court of Mississippi states the question at issue in this case as follows:

"The appellee instituted a suit against the appellant in the "Second District of Hinds County for personal injuries in- "flicted upon him by the appellant Railway Company, "through its negligent operation of its train.

"The Railway Company filed a plea in abatement to the "effect that the suit should have been begun in the First "District Court of Hinds County, the place where the al- "leged cause of action accrued, or in the Circuit Court of "Attala County, of which county the plaintiff was a resident "citizen at the time the alleged cause of action accrued.

"The plaintiff demurred to the plea in abatement, and his "demurrer was sustained. The defendant then filed the gen- "eral issue and notice of contributory negligence on the part "of the plaintiff.

"The question raised by the plea in abatement is of some "interest, and we have decided to express our views there- "on. The concrete question is about this:

"Did Congress confer upon the President of the United "States or the Director of Railroads the power to fix the "*venue* of actions against the railroads while the same were "under Federal control. The question is pertinent here, be- "cause the plea in abatement is based upon the assumption "that Congress did delegate to the Executive this power. If "the defendant below is wrong, it follows that the trial Court "did not err when it sustained the demurrer to the plea in "abatement. The trial Judge stated his reasons for sustain- "ing the demurrer, and we here copy same:

> "If Order No. 18 issued by the Director General of "Railroads is a valid exercise of power vested in him, "the plea in abatement of this action is good. The "order manifestly was intended to, and does, limit the "right to maintain the action at this time to the dis- "trict where the injury occurs, or the district of "plaintiff's residence, where there are more than one "district within the jurisdiction of the particular "Court, limiting the *venue* to the place of jurisdiction "of plaintiff's residence."

It then holds that Congress did **not** confer on the President the power to fix the *venue* of actions against the railroads whilst same were under Federal control, and in effect holds orders Nos. 18 and 18a null and void.

The facts are that the Federal Control Act being the Act of Congress approved March 21, 1918, reads in part as follows:

> "Sec. 10. That carriers while under Federal control shall be subject to all laws and liabilities as common carriers, whether arising under State or Federal laws, or at common law, except in so far as may be inconsistent with the provisions of this act, or any other Act applicable to such Federal control, **OR WITH ANY ORDER OF THE PRESIDENT.** Actions at law or suits in equity may be brought by and against such carriers and judgments rendered as now provided by law; and in any action at law or suit in equity against the carrier, no defense shall be made thereto upon the ground that the carrier is an instrumentality or agency of the Federal Government. Nor shall any such carrier be entitled to have transferred to a Federal Court any action heretofore or hereafter instituted by or against it, which action was not so transferable prior to the Federal control of such carrier; and any action which has heretofore been so transferred because of such Federal control, or of any Act of Congress, or official order or proclamation relating thereto shall, upon motion of either party, be transferred to the Court in which it was originally executed. But no process, *mesne* or final, shall be levied against any property under such Federal control.

Section 9, in part, provides:

> "And the President, in addition to the powers conferred by this act, shall have, and is hereby given, such other and further powers necessary or appropriate to give effect to the powers herein and heretofore conferred."

That acting under the authority thus vested in him, the President, through his duly authorized representative, the Director General of Railroads, had, prior to the institution of said suit, issued and promulgated his Orders Nos. 18 and 18a, reading as follows:

> "U. S. RAILROAD ADMINISTRATION,
> "Office of the Director General, Washington,
> "April 9, 1918.
>
> "General Order No. 18.
>
> "Whereas, the Act of Congress approved March 21, 1918, entitled an 'Act to provide for the operation of transportation systems while under Federal control', provides (Section 10), 'that carriers while under Federal control shall be subject to all laws and liabilities as common carriers, whether arising under State or Federal laws, or at common law, except in so far as may be inconsistent with the provisions of this Act or with any order of the President. * * * But no process, *mesne* or final, shall be levied against any property under such Federal control; and
>
> "Whereas, it appears that suits against the carriers for personal injuries, freight and damage claims are being brought in States and jurisdictions

far remote from the place where plaintiffs reside or where the cause of action arose, the effect thereof being that men operating the trains engaged in hauling war materials, troops, munitions or supplies are required to leave their trains and attend Court as witnesses, and travel sometimes for hundreds of miles from their work, necessitating absence from their trains for days and sometimes for a week or more, which practice is highly prejudicial to the just interests of the government, and seriously interferes with the physical operation of the railroads, and the practice of suing in remote jurisdictions is not necessary for the protection of the rights or the just interests of plaintiffs.

"It is, therefore, ordered that all suits against carriers while under Federal control must be brought in the county or district where the plaintiff resides, or in the county or district where the cause of action arose.

"W. G. McADOO,
"Director General Railroads."

"U. S. RAILROAD ADMINISTRATION,
"Office of the Director General, Washington,
"April 18, 1918.

"General Order No. 18a.

"General Order No. 18, issued April 9, 1918, is hereby amended to read as follows:

"It is, therefore, ordered that all suits against carriers while under Federal control must be brought in the county or district where the plaintiff resided at the time of the accrual of the cause of action or

in the county or district where the cause of action arose.

"W. G. McADOO,
"Director General of Railroads."

The Court will at once notice that Congress, as a part of the war powers given the President by the Act, expressly gave to that Executive the power **by an order** to relieve the carriers from the provisions of any State or Federal law which interfered with their operations.

The Act expressly says (Section 10):

> "That carriers while under Federal control shall be subject to all laws and liabilities as common carriers, whether arising under State or Federal laws * * *, except in so far as may be inconsistent with any order of the President."

The President, acting through the Director General, found it detrimental to the service to permit suits to be filed against the railroads at indiscriminate points, and so made a reasonable and fair regulation on the subject. The Supreme Court of Mississippi challenges his right, under the act, so to do. That the Supreme Court of Mississippi erred is demonstrated by the following exposition of the subject, which we quote from U. S. District Judge Trieber, of the Eastern District of Missouri, in

253 Federal, 459, Wainwright v. Pa. R. R. Co.:

> "'(1) Has Congress the power to enact this leg-
> "islation, assuming that it vests the power claimed,
> "on behalf of the defendant?"

"That Congress possesses the power to enact legislation "of this nature, under the Constitution, cannot be ques- "tioned at this day. There are several grounds upon which "it must be sustained.

"(1) In *McCulloch v. Maryland, 17 U. S. (4 Wheat.) "316, 421 (D. L. Ed. 579)*, Chief Justice Marshall, deliver- "ing the opinion of the Court, it was held as a proper canon "of the interpretation of the powers of Congress under the "National Constitution, among others:

> " 'Let the end be legitimate, let it be within the "scope of the Constitution, and all means which are "appropriate, which are plainly adapted to that end, "which are not prohibited, but consist with the letter "and spirit of the Constitution, are constitutional.'

"This rule of construction has never been doubted or ques- "tioned by any subsequent decision, but has been uniformly "followed whenever it has been before the Courts, and must, "therefore, be accepted as elementary in the construction of "the National Constitution. That there is nothing in the "Constitution prohibiting Congress from determining the "*venue* in civil actions is beyond question.

"Article 1, par. 8, cl. 11, of the Constitution, grants Con- "gress the power to declare war, and clause 12 of that sec- "tion empowers it to raise and support armies. That, by "virtue of these provisions of the Constitution, Congress "may use all means which are, in its opinion, appropriate to "that end and not prohibited by some provision of the Con-

"stitution, has, under the rules established in *McCulloch v.* "*Maryland*, been settled in *Miller v. United States, 78 U. S.* "*(11 Wall.) 268, 20 L. Ed. 135*, and *Stewart v. Kahn, 78 U.* "*S. (11 Wall.) 493, 506, 507, 20 L. Ed. 176*; reaffirmed in "*Mayfield v. Richards, 115 U. S. 137, 5 Sup. Ct. 1187; 29 L.* "*Ed. 334.* In *Stewart v. Kahn*, it was held:

> " 'The measures to be taken in carrying on war and "to suppress insurrection are not defined. The de- "cision of all such questions rests wholly in the dis- "cretion of those whom the substantial powers in- "volved are confided by the Constitution. In the lat- "ter case the power is not limited to victories in the "field and the dispersion of the insurgent forces. It "carries with it inherently the power to guard "against the immediate renewal of the conflict and to "remedy the evils which have arisen from its rise "and progress.'

"The same principle was recognized in the *Legal Tender* "*cases, 79 U. S. (12 Wall.) 457, 539 (2 0L. Ed. 386)*, where "it was held:

> " 'Before we can hold the Legal Tender Acts un- "constitutional, we must be convinced they were not "appropriate means, or means conducive to the exe- "cution of any or all of the powers of Congress, or of "the Government, not appropriate in any degree (for "we are not judges of the degree of appropriateness), "or we must hold that they were prohibited. This "brings us to the inquiry whether they were, when "enacted, appropriate instrumentalities for carrying "into effect or executing any of the known powers of "Congress, or of any department of the Government.

"Plainly to this inquiry, a consideration of the time "when they were enacted, and of the circumstances "in which the Government then stood, is important. "It is not to be denied that acts may be adopted to "the exercise of lawful power, and appropriate to it, "in seasons of exigency, which would be inappro- "priate at other times.'

"See also the address of former Justice Hughes on the "*War Powers Under the Constitution, 42 American Bar "Association, 232.*

"Whether the exigencies existed when Congress enacted "this statute was for that body to determine, and cannot be "questioned by the Courts, if there is any substantial ground "therefor. *McCulloch v. Maryland, supra; Lottery cases, "188 U. S. 321, 355, 23 Sup. Ct. 321, 47 L. Ed. 492; McDer- "mott v. Wisconsin, 228 U. S. 115, 128; 33 Sup. Ct. 431; "57 L. Ed. 754; 47 L. R. A. (N. S.) 984; An. Cases, 1915A, "39.* That there was substantial ground for the enactment "of the statute requires no argument. The conditions so "graphically described in the *Legal Tender cases, 79 U. S. "(Wall.) 540, 20 L. Ed. 286,* prevail now, and it will conduce "to brevity to refer to what was there said, without quoting "it in its opinion.

"That the Act was enacted under the war power is not "only apparent from its context, but it is expressly declared "in Section 16 of the Act, 'to be emergency legislation, en- "acted to meet conditions growing out of war,' and Section "14 provides that the Federal control of railroads shall con-

"tinue not exceeding one year and nine months after the "ratification of the treaty of peace.

"(2) Another ground upon which the Act must be sus- "tained is that the right to maintain an action in any par- "ticular Court is always subject to the legislative will. It is "only when one is deprived of all rights to maintain an ac- "tion for the redress of his wrongs that the statute would be "obnoxious to the Fifth Amendment to the Constitution. "Congress has uniformly exercised that power by providing "in what Courts suits may be maintained, and in no instance "has such an Act been held void. Among the many is Act of "March 3, 1873, c. 226, 17 Stat. 509, authorizing the Attor- "ney General to institute suits against the Union Pacific "Railroad Company, for certain acts, in any Circuit Court "of the United States. The constitutionality of this Act was "sustained in *U. S. v. Union Pacific R. R., 98 U. S. 569, 25 "L. Ed. 143.* The Carmack Amendment to the Interstate "Commerce Act, approved June 29, 1906 *(34 Stat. 595, c. "3591, par. 7, pars. 11, 12 (Comp. Stat. 1916, par. 8604a, "8604aa)*, authorizes an action against the receiving carrier, "regardless of the fact that the loss or damage sued for was "caused by a connecting carrier. Its constitutionality was "sustained in *Atlantic Coast Line v. Riverside Mills, 219 U. "S. 186, 31 Sup. Ct. 164, 55 L. Ed. 167, 31 L. R. A. (N. S.) 7, "Act Feb. 24, 1905, c. 778, 33 Stat. 811 (Comp. 1916, par. "6923)* vested the exclusive jurisdiction of actions on bonds "of contractors for the construction of public works in the "Courts of the district in which said contract was to be per- "formed and executed. The validity of the Act was sus-

"tained in *United States v. Congress Construction Co., 222 "U. S. 199, 203; 32 Sup. Ct., 44, 56 L. Ed. 163; Hopkins v. "Ellington & Guy, 246 U. S. 655, 38 Sup. Ct. 423, 62 L. Ed. "924,* and *Ex parte Southwestern Surety Ins. Co., 247 U. S. "19, 38 Sup. Ct. 430, 62 L. Ed. 961.* The Clayton Act, ap- "proved October 15, 1914, *38 Stat. 730, 737, c. 323, par. 12 "(Comp, St. 1916, par. 8835k),* expressly authorizes an ac- "tion by the Government not only in the district whereof "the defendant corporation is an inhabitant, but in any dis- "trict where it may be found or does business. Section 15 of "that Act *(Section 8835n)* authorizes service of process on "other parties than the offending corporation who are prop- "erly joined in any district where found. The validity of "these provisions was sustained in *Southern Photo Mate- "rial Co. v. Eastman Kodak Co. (D. C.), 234 Fed. 955.*

"Every State of the Union has provided by statute the "*venue* for civil actions in its Courts. In some States actions "may be brought only in the county where the defendant "resides; in some, where the defendant resides or may be "found. Some actions can only be maintained in the county "in which the cause of action is situated; and in some States "actions may be maintained in the county where either plain- "tiff or defendant resides. The various acts are referred to "in *22 Encyc. of Pa. & Pr. 790, et seq.* In *United States v. "Crawford (C. C.), 47 Fed. 561, 565,* Judge Parker said:

> " 'I have no doubt that Congress may provide for "service of process out of the district, as this is a "regulation of practice and subject to the legislative "control.'

"This was cited with approval by Judge Morrow, in "*United States v. American Lumber Co. (C. C.), 80 Fed.* "*309, and in Sidney L. Bauman, etc., Co. v. Hart, 192 Fed.* "*498, 113 CCA. 104.*

"(3) Another ground upon which the provisions of the "Act must be upheld is that the Courts of the United States, "inferior to the Supreme Court, are not established by the "Constitution, but owe their existence and powers to Con- "gress alone. That they possess no powers not granted by "an Act of Congress was determined as early as 1809 in "*Bank of United States v. Deveaux, 9 U. S. (5 Cranch.) 61;* "*3 L. Ed. 38;* and again, in 1812, in *United States v. Hudson,* "*11 U. S. (7 Cranch.) 32, 3 L. Ed. 259,* and uniformly ad- "hered to ever since. A late case in which this ruling is re- "affirmed is *In re Wisner, 203 U. S. 449, 455; 27 Sup. Ct.* "*150, 51 L. Ed. 264.* That Congress may increase or dimin- "ish their powers, or abolish them is beyond question. It "has done so a number of times. Judiciary Act, March 3, "1875, *c. 137, 18 Stat. 470,* extending the jurisdiction of the "Circuit Courts of the United States materially. Act of "March 3, 1887, *c. 373, 24 Stat. 552,* contracted it. The Ju- "dicial Code (Act March 3, 1911, *c. 232, 36 Stat. 1087)* in- "creased it in some respects and in others decreased it. By "that Act Congress abolished the Circuit Courts, and no one "ever questioned the exercise of these powers by Congress. "If Congress, by the Act under consideration, has seen "proper to authorize the contraction of the jurisdiction of "the District Courts, by limiting the Courts in which actions "may be maintained, it has only exerted the power which

"has been exercised ever since the enactment of the first "judiciary Act, in 1789 *(1 Stat. 73, c. 20)*, by the first Con- "gress under the Constitution. Possessing this power, Con- "gress may well determine in what Courts action may or "may not be maintained.

"The Constitution confers on the Supreme Court appel- "lant jurisdiction, but 'with such exceptions and under such "regulations as Congress shall make.' In *Ex parte McCar- "dle, 74 U. S. (7 Wall.) 506, 514, 19 L. Ed. 264*, it was held "that Congress could deprive that Court of appellant juris- "diction, and the repeal of an Act of Congress granting ap- "pellant jurisdiction in certain causes deprived the Court of "the power to review judgments in such actions. This case "has been followed as a correct interpretation of the powers "of Congress in all cases involving this question decided "since. *Murphy v. Utter, 188 U. S. 95, 109, 22 Sup. Ct. 776, "46 L. Ed. 1070.* In *Dooley v. Pa. R. R. Co. (D. C.), 250 "Fed. 142*, Judge Booth passed upon an Act similar to this "and sustained it.

"The contention that the statute is void, because vesting "administrative officers with legislative discretion of power, "is without merit. *Selective Draft cases, 245 U. S. 366, 389, "38 Sup. Ct. 159, 62 L. Ed. 349, L. R. A. 1918c, 361, An. "Cases 1918b, 856.* It is, therefore, clear that the Act, if it "authorizes these general orders, is within the power of "Congress under the Constitution.

"(2) Does the Act of Congress grant this power to the "President?

"Counsel for plaintiff contends that it does not, relying "upon that part of Section 10 of the Act, which reads:

> " 'Actions at law or suits in equity may be brought "by and against such carriers, and judgments ren- "dered as now provided by law.'

"In the opinion of the Court, all this quotation means is "that any person having a cause of action shall not, by rea- "son of this Act or any regulation made thereunder, be de- "prived of the right to maintain it in a proper Court, if, "under the State, Federal or Common Law, he is entitled to "a legal remedy. It does not mean, as claimed, that, having "a cause of action against the carrier, he has the right to in- "stitute it in any form in which he could have brought it "before the passage of this Act. To meet the exigencies ex- "isting during the war, Congress has granted to the Presi- "dent the power to say that one shall not maintain an action "in a forum where the natural effect of selecting such forum "will be, in the language of General Order No. 18:

> " 'That men operating trains engaged in hauling "war materials, troops, munitions or supplies are re- "quired to leave their trains and attend Court, as wit- "nesses, and travel sometimes for hundreds of miles "from their work, necessitating absence from their "trains for days, and sometimes for a week or more, "which practice is highly prejudicial to the just in- "terests of the Government and seriously interferes "with the physical operation of the railroad, and the "practice of suing in remote jurisdictions is not "necessary for the protection of the rights of the "just interests of plaintiffs.'

"That the exercise of the right to maintain actions in a "forum distant from the place where the witnesses reside "will seriously interfere with the successful prosecution of "the war, cannot be opened to doubt. How are the soldiers "drafted under the Selected Draft Act to be transported "from the interior to the seaports if the operation of trains "is to be interfered with in this manner? How are muni- "tions, clothing, food, coal and other supplies necessary to "carry on the war to be transported expeditiously if the em- "ployees, without whom trains cannot be operated, are to be "compelled to leave their employment to attend as witnesses "at places hundreds of miles away from where their duties "require them to be, whenever a person has, or imagines he "has, a cause of action against the carrier, and for his con- "venience, or in some instances, perhaps, to prevent a proper "defense, institutes the action in a Court far distant from "the district where the cause of action arose, and in a dis- "trict other than that of the residence of the plaintiff, at the "time of the accrual of the cause of action? The fact that "not only the plaintiff, but his witnesses, can more conveni- "ently attend the Court, if held at or near his home, or "where the cause of action accrued, may well raise a doubt "whether the selection of the foreign forum is always made "in good faith. The amendment of General Order No. 18 "by General Order No. 18a was evidently intended to pre- "vent a change of residence for the purpose of enabling a "suit to be brought at a distance from where the plaintiff re- "sided at the time of the actual accrual of the cause of ac- "tion, as is so frequently done to enable one to maintain an

"action in a national Court, instead of in the Courts of the "State of which the plaintiff and defendant were both citi- "zens at the time of the accrual of the cause of action.

"(3) But, aside from this, statutes may not be con- "strued by selecting some part thereof and disregarding "other parts. For a proper construction of a statute the "whole of it must be read together, to ascertain the legisla- "tive intent. In the language of Mr. Chief Justice White, in "*Van Dyke v. Cordova Copper Co., 234 U. S. 188, 191, 34* "*Supreme Court 884, 885, 58 L. Ed. 1273:*

> " 'We may not, in order to give effect to those "words, virtually destroy the meaning of the entire "context; that is, give them a significance which "would be clearly repugnant to the statute looked at "as a whole, and destructive of its obvious intent.'

"The various provisions of an Act should be read so that "all may, if possible, have their due and conjoint effect with "repugnancy or inconsistency. *New Lamp Chimney Co. v.* "*Ansonia Brass Co., 91 U. S. 656, 662, 23 L. Ed. 336; Aaron* "*v. United States, 204 Federal 943, 123 CCA. 265.*

"Applying this canon of construction to the Act, and giv- "ing effect to every part of it, as is our duty, it is apparent, "at once, how untenable this contention is. That part of "Section 10 applicable to the matter in controversy reads:

> " 'Sec. 10. That carriers while under Federal "control shall be subject to all laws and liabilities as

"common carriers, whether arising under State or "Federal laws or at common law, except in so far as "may be inconsistent with the provisions of this Act, "or any other Act applicable to such Federal control "or with any order of the President.'

"Another provision of the Act is Section 9:

"'And the President, in addition to the powers "conferred by this Act, shall have, and is hereby "given such other and further powers necessary or "appropriate to give effect to the powers herein and "heretofore conferred.'

"There is nothing in the General Orders under considera- "tion which deprives the plaintiff of her right to maintain "an action against the defendant, but for reasons of public "necessity, in a time of war, these regulations were made, "because, in the opinion of the President and Director Gen- "eral, for good and sufficient reasons, they are necessary to "prevent serious interference with the physical operation of "railroads under the control of the Government and em- "ployed in the prosecution of the war. The Act and regula- "tions may well be sustained upon the ground that *'salus "populi supreme lex est'* 'The welfare of the people is the "paramount law."

In *253 Federal 676, Cocker v. New York, O. & W. Ry. Co.*, U. S. District Judge Mayer, after saying:

"Several motions coming under General Orders 18, 18a and 26 have been disposed of by me from the

bench without a written opinion, but I have stated orally my reasons for granting or denying motions, as the case may be,"

dismissed still another case on the same ground. The syllabus of this opinion reads, in part:

"Suit against carrier while under Federal control, brought after promulgation of and contrary to General Orders Nos. 18 and 18a of the Director General of Railroads, in a county or district other than where the cause of action arose, or where plaintiff resided when it accrued, will be dismissed."

In *254 Federal 748, Harnick v. Pennsylvania R. R.*, the orders here at issue, namely, Orders 18 and 18a, were not at issue, but another order, namely, Order No. 26, which is applicable to another class of cases, was being considered. Circuit Judge Manton, however, made these pertinent remarks in regard to the present question:

" 'On August 29, 1916, Congress passed an Act, "entitled "An Act making appropriation for the sup-"port of the army for the fiscal year ending June 30, "1917, and for other purposes." '

'Act Aug. 29, 1916, c. 418, 39 Stat. 645 (Comp. "Stat. 1974a), which provides as follows:

" 'The President in time of war is empowered, "through the Secretary of War, to take possession "and assume control of any system or systems of "transportation, or any part thereof, and to utilize "the same, to the exclusion, as far as may be neces-

"sary, of all other traffic thereon, for the transfer or "transportation of troops, war material and equip- "ment, or for such other purposes connected with the "'emergency as may be needful or desirable.'

"Under this authority, on December 26, 1917, by a procla- "mation of the President, the Government took possession "and assumed control, on the 28th of December, 1917, of "each and every system of transportation and appurte- "nances thereof, located wholly or in part, within the boun- "daries of the continental United States. This proclama- "tion directed:

> " 'That the possession, control, operation and utili- "zation of such transportation systems hereby by me "undertaken shall be exercised by and through Wm. "G. McAdoo, who is hereby appointed and is desig- "nated Director General of Railroads.'

"By Act of Congress, March 21, 1918, c. 25 (Comp. St. "1918, par. 3115 3/4 a-3115-3/4), the President was author- "ized and given

> " 'such other and further powers necessary or ap- "propriate to give effect to the powers herein and "heretofore conferred.'

"The President's proclamation of December 26, 1917, pro- "vided:

> " 'Until and except so far as said director shall "from time to time otherwise by general or special "orders determine, such systems of transportation "shall remain subject to all existing statutes and or-

"ders of the Interstate Commerce Commission, and "to all statutes and orders of the regulating commis- "sion of the various States in which the said systems "or any part thereof may be situated. **BUT ANY "ORDERS, GENERAL OR SPECIAL, HERE- "AFTER MADE BY SAID DIRECTOR SHALL "HAVE PARAMOUNT AUTHORITY AND BE "OBEYED AS SUCH.'**

"Section 10 of the Act of March 21, 1918, provides:

" 'That carriers while under Federal control shall "be subject to all laws and liabilities as common car- "riers, whether arising under State or Federal laws "or at common law, except in so far as may be incon- "sistent with the provisions of this act or any part "applicable to such Federal control, **or with any or- "der of the President.** Actions at law or suits in "equity may be brought by and against such carriers "and judgments rendered as now provided by law. " * * * But no process, mesne or final, shall be "levied against any property under such Federal "control.' (Comp. Stat. 1918, par. 3115-3/4 j.)

" 'The jurisdiction of the District Court is limited, "and depends upon the statutory enactments of Con- "gress. Its jurisdiction may, therefore, be limited by "the same power which creates it. Congress has "given authority to the Director General, and the "President's proclamation provides, that any orders, "general or specific, made by the director, shall have "paramount authority and be obeyed as such. Like- "wise, it is provided that actions at law, or suits in "equity may be brought by or against such carriers "and judgments rendered as now provided by law.

"This indicates clear intent to permit actions pending "to be tried and action to be instituted thereafter. "The right to pursue a remedy in a particular Court "is not a vested right and may be removed while an "action is pending. Railroad Company v. Grant, 98 "U. S., 398, 25 L. Ed. 231.' "

"The jurisdiction of the District Court is limited "and depends upon the statutory enactments of Con- "gress. Its jurisdiction may, therefore, be limited by "the same power which creates it. Congress has "given authority to the Director General and the "President's proclamation provides that any orders, "general or specific, made by the Director shall have "paramount authority and be obeyed as such. Like- "wise, it is provided that actions at law or suits in "equity may be brought by or against such carriers "and judgments rendered as now provided by law. "This indicates clear intent to permit actions pend- "ing to be tried and actions to be instituted there- "after. The right to pursue a remedy in a particu- "lar Court is not a vested right and may be removed "while an action is pending. Railroad Co. v. Grant, "98 U. S., 398. The right to stay an action pending "under Order No. 26, however, is dependant upon "whether the interest of the Government be preju- "diced by a present trial of a pending suit, and there "must be a showing of prejudice by reason of a pres- "ent trial."

The next case to which we wish to call the Court's attention is the case of *Rhodes v. Tatum,* which was decided by the Court of Civil Appeals for the State of Texas, in 1918.

In this case, the Judge of the lower Court had held orders 18 and 18a valid, and had refused to hear a case brought in a jurisdiction other than the jurisdiction designated by those orders. The plaintiff thereupon sought by mandamus to compel the hearing of the case, and the Court of Civil Appeals refused the mandamus. The syllabus reads as follows:

206 S. W., 114, Rhodes v. Tatum (Texas, 1918):

> "Under Act of Congress of August 26, 1916, empowering the President to take possession of systems of transportation, and Act of March 21, 1918, as to operation of transportation systems under Federal control Section 9 of which gives the President all powers necessary or apropriate to give effect to this power of regulation and control, the President's appointment of a Director General and the orders of the Director General Nos. 18, 18a and 26, in effect requiring suits against carriers under Federal control to be brought in the county where plaintiff resided at the time of the injury, or where the cause of action arose, and prohibiting trial of a suit brought in any other county, are valid.
>
> "Congress may authorize an executive officer to make such rules and regulations as may be necessary to the efficient execution of the laws, though their enforcement depends upon conditions to be ascertained by him and the exercise of his sound discretion.
>
> "Act of Congress August 29, 1916, empowering the President to take possession of systems of trans-

portation, and Act of Congress March 21, 1918, as to operation of transportation systems under Federal control, General Order 18 of the Director General of Railroads, General Order No. 18a and General Order No. 26, which relate only to the remedy of a person injured and desiring to sue, are not subject to the objection that they are *ex post facto or* retroactive."

We also call the Court's attention to the following cases: *179 N. Y. Sup., 310, Russ v. N. Y. Central, decided December 29, 1919.* The syllabus reads:

"Under order of Director General of Railroads of April 18, 1918, personal injury action against railroads and Director General of Railroads should have been brought in county in which accident took place and in which plaintiff and witnesses resided, and when brought in another county defendants were entitled to change of place of trial without conditions, notwithstanding laches in making of motion.

"Courts will recognize the policy of the Government to interfere as little as possible with the convenience of parties and witnesses in suits brought against railroads while under Government control. (See also *180 N. Y. Sup., 618, Kleen v. Director General.)*

We respectfuly submit that the reasons given in the foregoing pages are unanswerable. The Congress of the United States as a war measure, took over the transportation system of the country and handed them over to the President

or his representative, the Director General for administration. The Director General found that as a war measure, it was essential that these carriers should be sued only in stated jurisdictions, for the reason that to permit suits elsewhere would be a distinct detriment to the service and an interference with the prosecution of the war. The right of Congress thus to act has not been questioned by the Supreme Court of Mississippi, although it was questioned by the plaintiff in this case. The Supreme Court of Mississippi confined itself to contending that Congress had not acted. Section 10 of the Federal Control Act which we have quoted *supra*, states plainly that the carriers while under Federal control shall be subject to all laws and liabilities as common carriers, except in so far as may be inconsistent with any order of the President; that is to say, that the act specifically says that the President (and for the purposes of this discussion, the Director General is the President), shall have the right to issue an order exempting the carriers while under Federal control from the operation of State or Federal laws. This is what the Director General has done to a very limited extent in issuing Orders Nos. 18 and 18a. Those orders are entirely reasonable, are within the scope of his authority and are predicated upon sound judgment. Indeed, this Court will find by reference to its decision in the case of the *Southern Railway Co. v. Simon, 236 U. S., 130*, that it has itself strongly intimated that causes of action against carriers should not be brought indiscriminately but should be brought in the jurisdiction either of the plaintiff's domicile or of the Court where the accident occurred.

We respectfully submit, therefore, that the decision of the Supreme Court of Mississippi should be reversed and remanded for trial.

Respectfully submitted,

J. BLANC MONROE,
MONTE M. LEMANN,
R. H. THOMPSON,

May, 1920.

APR 14 1921
JAMES D. MAHER,
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1920.

No. 339 55

THE ALABAMA AND VICKSBURG RAILWAY CO., ET AL.,

Petitioners,

versus

SMITH JOURNEY,

Defendant.

Brief for Plaintiff in Error and Petitioner for Certiorari to the Supreme Court of the State of Mississippi.

J. BLANC MONROE,
MONTE M. LEMANN,
R. H. THOMPSON,
Attorneys for Plaintiff in Error.

April, 1920.

E. P. Andree Ptg. Co., 516 Natchez St., New Orleans, La.

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SYLLABUS.

1. The enactment of the Federal Control Act was a valid exercise of the powers granted to Congress by the Constitution.

2. Under the Federal Control Act the President, or his duly constituted representative, the Director General of Railroads, was authorized to issue an order limiting the jurisdictions in which suits could be brought against railroads during Federal control. To either:

(a) The place where the accident occurred, (b) the place of the residence of the plaintiff.

3. In the present instance, although the suit was filed during the European war, while the roads were under Federal control, and after the issuance of such orders, the Courts of Mississippi have insisted upon trying this case in a jurisdiction other than the two mentioned, to the detriment of the carrier.

4. From superabundance of caution this case has been brought up by writ of error as well as *certiorari*.

If the Court Please:

The Supreme Court of Mississippi states the question at issue in this case as follows: 84 Southern 706:

> "The appellee instituted a suit against the ap-
> "pellant in the Second District of Hinds County for
> "personal injuries inflicted upon him by the appellant
> "Railway Company, through its negligent operation
> "of its train.
>
> "The Railway Company filed a plea in abatement
> "to the effect that the suit should have been begun
> "in the First District of Hinds County, the place
> "where the alleged cause of action accrued, or in
> the Circuit Court of Attala County, of which county
> "the plaintiff was a resident citizen at the time the
> "alleged cause of action accrued.
>
> "The plaintiff demurred to the plea in abatement,
> "and his demurrer was sustained. The defendant
> "then filed the general issue and notice of contribu-
> "tory negligence on the part of the plaintiff.
>
> "The question raised by the plea in abatement is

"of some interest, and we have decided to express "our views thereon. The concrete question is about "this:

"Did Congress confer upon the President of the "United States or the Director of Railroads the pow- "er to fix the *venue* of actions against the railroads "while the same were under Federal control. The "question is pertinent here, because the plea in "abatement is based upon the assumption that Con- "gress did delegate to the Executive this power. If "the defendant below is wrong, it follows that the "trial Court did not err when it sustained the demur- "rer to the plea in abatement. The trial judge stat- "ed his reasons for sustaining the demurrer, and we "here copy same:

"If Order No. 18 issued by the Director General of "Railroads is a valid exercise of power vested in him, "the plea in abatement of this action is good. The "order manifestly was intended to, and does, limit "the right to maintain the action at this time to the "district where the injury occurs, or the district of "plaintiff's residence, where there are more than one "district within the jurisdiction of the particular "Court, limiting the *venue* to the place of jurisdic- "tion of plaintiff's residence."

It then holds that Congress did **not** confer on the President the power to fix the *venue* of actions against the railroads whilst same were under Federal control, and in effect holds orders Nos. 18 and 18a null and void.

The facts are as follows:

"On August 29, 1916, Congress passed an Act entitled 'An Act making appropriation for the support of the army for the fiscal year ending June 30, 1917, and for other purposes.'

"Act Aug. 29, 1916, c. 418, 39 Stat. 645 (Comp. Stat. 1974a), which provides as follows:

"'The President in time of war is empowered, "through the Secretary of War, to take possession 'and assume control of any system or systems of "transportation, or any part thereof, and to utilize "the same, to the exclusion, as far as may be neces- "sary, of all other traffic thereon, for the transfer or "transportation of troops, war material and equip- "ment, or for such other purposes connected with the "emergency as may be needful or desirable.'"

Under this authority, by a proclamation of the President, issued on Dec. 26, 1917, the Government took possession and assumed control, on the 28th of December, 1917, of each and every system of transportation and appurtenances thereof, located wholly or in part, within the boundaries of the continental United States. This proclamation directed:

"That the possession, control, operation and utili- "zation of such transportation systems hereby by me "undertaken shall be exercised by and through Wm. "G. McAdoo, who is hereby appointed and is desig- "nated Director General of Railroads."

* * * * * *

"Until and except so far as said director shall "from time to time otherwise by general or special "orders determine, such systems of transportation "shall remain subject to all existing statutes and or- "ders of the Interstate Commerce Commission, and "to all statutes and orders of the regulating com- "mission of the various states in which the said sys- "tems or any part thereof may be situated. **BUT "ANY ORDERS, GENERAL OR SPECIAL, HERE- "AFTER MADE BY SAID DIRECTOR SHALL**

"HAVE PARAMOUNT AUTHORITY AND BE "OBEYED AS SUCH."

Thereafter Congress passed the Federal Control Act being the Act of Congress approved March 21, 1918, which reads in part as follows:

> "Sec. 10. That carriers while under Federal control shall be subject to all laws and liabilities as common carriers, whether arising under State or Federal laws, or at common law, except in so far as may be inconsistent with the provisions of this act, or any other Act applicable to such Federal control, **OR WITH ANY ORDER OF THE PRESIDENT.** Actions at law or suits in equity may be brought by and against such carriers and judgments rendered as now provided by law; and in any action at law or suit in equity against the carrier, no defense shall be made thereto upon the ground that the carrier is an instrumentality or agency of the Federal Government. Nor shall any such carrier be entitled to have transferred to a Federal Court any action heretofore or hereafter instituted by or against it, which action was not so transferable prior to the Federal control of such carrier; and any action which has heretofore been so transferred because of such Federal control, or of any Act of Congress, or official order or proclamation relating thereto shall, upon motion of either party, be transferred to the Court in which it was originally executed. But no process *mesne* or final, shall be levied against any property under such Federal control."

Section 9, in part, provides:

> "And the President, in addition to the powers conferred by this act, shall have, and is hereby given, such other and further powers necessary or appropriate to give effect to the powers herein and heretofore conferred."

That acting under the authority thus vested in him, the President, through his duly authorized representative, the Director General of Railroads, prior to the institution of said suit, issued and promulgated his Orders Nos. 18 and 18a, reading as follows:

"U. S. RAILROAD ADMINISTRATION,
"Office of the Director General, Washington,
"April 9, 1918.
"General Order No. 18.

"Whereas, the Act of Congress approved March 21, 1918, entitled an 'Act to provide for the operation of transportation systems while under Federal control,' provides (Section 10), 'that carriers while under Federal control shall be subject to all laws and liabilities as common carriers, whether arising under State or Federal laws, or at common law, except in so far as may be inconsistent with the provisions of this Act or with any order of the President. * * * But no process, *mesne* or final, shall be levied against any property under such Federal control; and

"Whereas, it appears that suits against the carriers for personal injuries, freight and damage claims are being brought in States and jurisdictions far remote from the place where plaintiffs reside or where the cause of action arose, the effect thereof being that men operating the trains engaged in hauling war materials, troops, munitions or supplies are required to leave their trains and attend court as witnesses, and travel sometimes for hundreds of miles from their work, necessitating absence from their trains for days and sometimes for a week or more, which practice is highly prejudicial to the just interests of the government, and seriously interferes with the physical operation of the railroads,

and the practice of suing in remote jurisdictions is not necessary for the protection of the rights or the just interests of plaintiffs.

"It is, therefore, ordered that all suits against carriers while under Federal control must be brought in the county or district where the plaintiff resides, or in the county or district where the cause of action arose.

"W. G. McADOO,
"Director General Railroads."

"U. S. RAILROAD ADMINISTRATION,
"Office of the Director General, Washington,

"April 18, 1918.

"General Order No. 18a.

"General Order No. 18, issued April 9, 1918, is hereby amended to read as follows:

"It is, therefore, ordered that all suits against carriers while under Federal control must be brought in the county or district where the plaintiff resided at the time of the accrual of the cause of action or in the county or district where the cause of action arose.

"W. G. McADOO,
"Director General of Railroads."

This being the legal situation on April 30, 1918, while this country was at war and while petitioner and other interstate carriers were under the control of the President of the United States, by virtue of the Act of Congress known as as the Federal Control Act, approved March 21, 1918, one Smith Journey, a then resident of Attala County, Miss., instituted a suit for damages for personal injuries, against petitioner, the Alabama & Vicksburg Railway Com-

pany; the said suit was filed not in Attala County, where the plaintiff resided, and not in the first (State) Circuit Court of Hinds County, Mississippi, the court having jurisdiction of the place where the injury was alleged to have been sustained but in another and different court, namely, the Second Circuit Court of Hinds County, Miss., which said court was neither the court of the plaintiff's domicile, nor the court having jurisdiction of the place where the accident happened. The defendant, by timely pleadings, properly filed, objected to the jurisdiction of said Court on the grounds that, R., page 3:

a. The railroads, including your petitioner, had as a war measure, been taken under control by the Federal Government.

b. That the said control was authorized by the Act of Congress known as the Federal Control Act, approved March 21, 1918, and that the said act provided in part:

> "Sec. 10. That carriers while under Federal control shall be subject to all laws and liabilities as common carriers, whether arising under State or Federal laws, or at common law, except in so far as may be inconsistent with the provisions of this Act or any other Act applicable to such Federal control, or with any order of the President. Actions at law or suits in equity may be brought by and against such carriers and judgments rendered as now provided by law; and in any action at law or suit in equity against the carrier, no defense shall be made thereto upon the ground that the carrier is an instrumentality or agency of the Federal Government. Nor shall any such carrier be entitled to have transferred to a Federal Court any action hereto-

fore or hereafter instituted by or against it, which, action was not so transferable prior to the Federal control of such carrier; and any action which has heretofore been so transferred because of such Federal Control or of any Act of Congress, or official order or proclamation relating thereto, shall, upon motion of either party, be retransferred to the Court in which it was originally instituted. But no process, *mesne* or final, shall be levied against any property under such Federal control."

Section 9, in part, provides:

"And the President, in addition to the powers conferred by this Act, shall have and is hereby given such other and further powers necessary or appropriate to give effect to the powers herein and heretofore conferred."

c. That, acting under the authority thus vested in him, the President, through his duly authorized representative, the Director General of Railroads, had prior to the institution of said suit, issued and promulgated his Orders Nos. 18 and 18a, reading as above set forth.

d. That as this suit was a suit against a carrier for damages for personal injuries, it could not be brought in the Circuit Court of the Second District of Hinds County, Miss., since that Court was neither the court of the district where the plaintiff resided nor of the district where the supposed cause of action arose.

This objection to the jurisdiction or plea in abatement was not a mere technical objection, it was made in good faith because of the inconvenience and detriment to the

service resultant from having to transport witnesses to a point off the line of railroad and also because the jurisdiction selected by plaintiff was notoriously hostile to interstate carriers.

The objection to the jurisdiction (or plea in abatement) was demurred to by the plaintiff, on the following grounds:

"1. That the said plea in abatement is wholly insufficient in law.

"2. That said plea in abatement is without authority of law.

"3. That said plea in abatement pleads an order of the Director General of Railroads, which order of said Director General is not law and not binding upon plaintiff.

"4. That said order of said Director General is in conflict with the Constitution of the United States in that it undertakes to deny the plaintiff a trial of his cause in a court of competent jurisdiction.

"5. Because the Act of Congress of March 21, 1918, does not give authority to the Director General of Railroads to limit the jurisdiction of the cause of action in the above styled suit.

"6. Because said plea is in violation of the said Act of Congress and is without authority of law and contrary to the law."

The judge of first instance, sustained this demurrer and overruled defendant's objection to the jurisdiction (plea in abatement), saying in part:

"If Order No. 18, issued by the Director General of Railroads, is a valid exercise of power vested in

> him, the plea in abatement of this action is good. The order manifestly was intended to, and does, limit the right to maintain the action at this time to the district where the injury occurs, or the district of plaintiff's residence, where there are more than one district with the jurisdiction of the particular court; limiting the venue to the place of jurisdiction of the injury, or the place of jurisdiction of plaintiff's residence."

And then proceeded to hold that the Act of Congress gave to the President or his representative, the Director General, no power to make Orders Nos. 18 and 18a.

The defendant carrier, by timely action, reserved its rights under the Constitution and laws of the United States, and as it was forced to do, went into the trial of the case.

The evidence showed that plaintiff's residence was in Attala County, Miss., and that the accident occurred in the jurisdiction of the First Circuit Court of Hinds County, Mississippi. The suit was not brought in either of these jurisdictions, so that, as the judge correctly states, "if Order 18 is legal and binding, the plea in abatement was good." The evidence further shows that Journey, the plaintiff and appellee, at the time he suffered the injury for which he sues, October, 1917, was a soldier in the service of the United States Government, stationed at Vicksburg. A state fair was at the time being held at Jackson. The paintiff, as he himself testified, for his own pleasure, came to Jackson to enjoy the fair. Seeking to return to Vicksburg, he sought transportation **ON A FREIGHT TRAIN** of the railway company, **WHICH DID NOT CARRY PASSENGERS AND THE SERVANTS OF THE COM-**

PANY OPERATING THE SAME WERE FORBIDDEN TO ALLOW PERSONS TO BE CARRIED ON THE TRAIN. The plaintiff averred in his declaration that the Railway Co., because the soldiers had before the time that he was injured been guarding some of its property, allowed soldiers to ride free on any and all of its trains, but this was denied and the proof was overwhelming to the contrary. It was testified that the soldiers rode freight trains in spite of the company's remonstrances and its ability to prevent them so doing. The plaintiff's own testimony on this subject was alone to the effect that the soldiers rode on freight trains; he did not testify that the company assented for them to take passage on its freight trains and he swore to nothing on this subject contradicting the fact, shown by other witnesses, that the soldiers rode freight trains in spite of the company's efforts to prevent them from so doing.

Plaintiff did not seek to board the train at a place where passengers were generally received. On the occasion when he suffered injuries, he went in the night time to a point in the company's yards, near the extreme limits of the City of Jackson, where an office was maintained by the railway for convenience in giving train operatives telegraphic orders and where trains were made up, and there remained, with a goodly number of soldiers, until the freight train upon which he sought to return to Vicksburg came into the company's private grounds and yards, and then endeavored to get upon it. The plaintiff testified, although he was overwhelmingly contradicted on this point, that he sought the conductor of the freight train and obtained his permission

to get aboard of it. Why he should have sought permission, if, as he swore, the company willingly and habitually carried soldiers free, is unexplained. The only explanation that can be given is that Journey sought to ride free by collusion with the conductor.

Plaintiff further testified that he got upon the ladder on the side of the freight car just as the train was starting and before he reached the top of the car he was carried into contact with a piece of lumber protruding from a car standing on a side track near its junction with the main line of the railroad, and was knocked off, falling in such a way as to receive the injury mentioned in the declaration. The plaintiff, as the Court will see, was most thoroughly discredited. His own statements of the facts of the case, made shortly after the accident, are wholly inconsistent with and contradict his testimony in every material particular. In fact, he was contradicted by every material witness who testified on the trial of the case. The conductor testified that he did not authorize the plaintiff to get upon the train and did not see him at all on the occasion of his injury. The other witnesses who had knowledge of the occurrences testified that no car upon the side track had a piece of timber protruding from it; **THAT PLAINTIFF ENDEAVORED TO BOARD THE FREIGHT TRAIN WHILE IT WAS MOVING, THAT HIS FOOT SLIPPED FROM THE JOURNAL BOX OR LADDER ON WHICH HE PLACED IT FOR THE PURPOSE OF CLIMBING ON THE TRAIN WAS BY THE SLIP PROTRUDED ONTO THE RAIL OF THE TRACK IN FRONT OF THE CAR'S WHEEL AND MASHED, HIS TOES BEING AMPUTATED.** It

was further shown that on several occasions before his injury the plaintiff had stated to soldiers, his associates, that he intended to get out of the army and, if necessary to do so, would lose an arm or leg.

Notwithstanding all this, the request of the defendants for peremptory instructions were refused, and the jury proceeded to award to the plaintiff five thousand dollars damages.

Defendant appealed to the Supreme Court of Mississippi and that tribunal, 84 Southern 706, affirmed the judgment, handing down an opinion, a copy of which is in the record, p. —, in which it used the language quoted at the opening of this brief and held orders 18 and 18a invalid.

Defendant company sued out and lodged in this Court a writ of error with *supercedeas*, which is still pending under the title of *Alabama & Vicksburg Railway Company v. Smith Journey*, No. —, and later, out of a superabundance of caution, made application for *certiorari*, alleging that its rights under the Constitution and laws of the United States have been violated and that it has been denied due process of law, and that the judgment of the Supreme Court of Mississippi, and of the court of first instance, should be reversed, its plea in abatement sustained and the suit dismissed. The *certiorari* was referred for hearing with the writ of error and both are before this Court at this time.

THE POINT WAS PROPERLY RESERVED.

The able brief of the attorneys opposing the petition for *certiorari* does violence to the record and to the law of Mississippi, in so far as it contends that the railway

company by pleading to the merits waived its plea in abatement, and lost the right to complain of the judgment sustaining a demurrer to said plea.

FIRST. THE CONTENTION VIOLATES THE RECORD.

The Supreme Court of Mississippi did not decide that the plea in abatement was waived or that the right to complain of its having been adjudged insufficient in law was lost by the railway company. On the contrary, that Court held that:

> "If Order No. 18, issued by the Director General of Railroads, is (was) a valid exercise of power vested in him, the plea in abatement of this action is good."

The judgment of the trial court sustaining the demurrer to the plea, setting up the Orders, Nos. 18 and 18A of the Director General of Railroads, Rec., p. —, expressly granted the Railway Co. leave to plead further and its order provided that the exception therein noted should be treated as a formal bill of exceptions to the ruling of the Court sustaining the demurrer to the plea. It is unreasonable to think that the Court wittingly allowed an exception to its ruling and at the same time and in the same order decreed the waiver of the exception.

The Supreme Court of Mississippi in its opinion in this case (84 So. Rep. 706) with approval quoted at length from the written opinion of the trial judge wherein he announced:

> "If Order No. 18, issued by the Director General of Railroads, is (was) a valid exercise of power vested in him, the plea in abatement of this action is good."

This finding was affirmed by the Supreme Court of Mississippi, and that too after the defendant railway company had pleaded to the merits, after the trial on its plea to the merits and after every thing had been done upon which opposing counsel now seek to predicate the alleged waiver presented by them in argument. The State Supreme Court decided that Order No. 18 was invalid. It cannot be inferred that the State Supreme Court would have based its decision upon a question, the right to present which had been waived by the party urging it. The State Supreme Court did nothing of the kind, it decided the Federal question presented by this record upon what the Court adjudged to be its merits, without effort to evade it.

SECOND. THE CONTENTION OF OPPOSING COUNSEL VIOLATES THE LAW OF MISSISSIPPI.

In *Kendrick v. Watkins*, 54 Miss. 495, the Supreme Court of Mississippi decided (1877) that:

> "When a demurrer to a plea in abatement is sustained, the judgment is *respondeat ouster*, and the defendant may then plead to the merits."

This is the unquestioned law of that state. It has not, to our knowledge, been questioned since 1877. There is no reported decision, we have been able to find, affecting in any way the decision in *Kendrick v. Watkins, supra*, on the point for which we cite it.

The case of *Memphis & Charleston R. Co. v. Glover*, 78 Miss. 467, relied upon by opposing counsel, is not in point and in no way affects the authority of *Kendrick v. Watkins*. In the *Glover* case the receivers of a railroad while

operating the road incurred a statutory liability and were sued by Glover therefor. Pending the suit that part of the railroad within the State of Mississippi was sold under the orders of the Court by which the receivers were appointed and by the terms of the sale the purchaser assumed and promised to pay any and all liabilities incurred by the receivers. After the sale the receivers were discharged, pleaded their discharge to Glover's suit and were dismissed therefrom. Whereupon Glover, the plaintiff in the suit, by *scire facias* sought to revive his action against the purchaser, the Memphis & Charleston Railroad Company. The purchaser appeared to the *scire facias*, the proceeding seeking the revival of the suit, and moved to quash the same. **THE PURCHASER DID NOT PLEAD IN ABATEMENT AND THERE WAS NO DEMURRER TO ANY PLEADING IN THE CASE.** There did not arise in said case any question at all akin to the one sought by opposing counsel to be injected into the case at bar. The purchaser's motion in the *Glover* case to quash the *scire facias* seeking to revive the suit was overruled, and thereupon he pleaded to the merits. The case was tried on its merits and decided for the plaintiff and the defendant, the purchaser, appealed to the State Supreme Court. The State Supreme Court held that error could not be predicated of the judgment overruling the motion to quash the *scire facias*.

It is apparent, we think, that the motion in the *Glover* case to quash the *scire facias* largely involved the same questions as were presented by the plea to the merits. The motion and the plea to the merits both involved the

question whether the purchaser was liable to the plaintiff because of his assumption to pay the liabilities incurred by the receivers in their operation of the railroad. If the purchaser assumed the liability pleaded in the declaration his motion to quash the *scire facias* was properly overruled. If he did not so assume his plea to the merits should have been maintained. On the trial under his plea to the merits, he had the right to show that he had not assumed the liability sued upon by the plaintiff, and this of course rendered the disposition of his motion immaterial, and hence, on appeal he could not predicate error of the judgment overruling his motion to quash the *scire facias*.

THIRD. A CONCLUDING OBSERVATION.

There are some parts of the brief to which we are replying which seem by indirection to claim that this suit was instituted in a court having territorial jurisdiction of the place where plaintiff is alleged to have suffered the injury pleaded in his declaration. To such argumentation we reply: The decisions and opinions of the trial court and of the State Supreme Court in this case dispose of all questions touching the fact that this suit was instituted and prosecuted in a court in which it was prohibited to be brought. Both Courts say, "If Order No. 18, issued by the Director General of Railroads, is (was) a valid exercise of power vested in him." Both necessarily decided that, if Order No. 18 was valid, this suit was wrongfully instituted in the court where it was begun and prosecuted to judgment.

ARGUMENT.

The Court will at once notice that Congress, as a part of the war powers given the President by the Act, expressly gave to that Executive the power **by an order** to relieve the carriers from the provisions of any State or Federal law which interfered with their operations.

The Act expressly says (Section 10):

> "That carriers while under Federal control shall be subject to all laws and liabilities as common carriers, whether arising under State or Federal laws * * *, **except in so far as may be inconsistent with any order of the President.**"

The President, acting through the Director General, found it detrimental to the service to permit suits to be filed against the railroads at indiscriminate points, and so made a reasonable and fair regulation on the subject. The Supreme Court of Mississippi challenges his right, under the act, so to do. That the Supreme Court of Mississippi erred is demonstrated by the following exposition of the subject, which we quote from U. S. District Judge Trieber, of the Eastern District of Missouri, in 253 Federal 459, *Wainright v. Pa. R. R. Co.*:

> "'(1) Has Congress the power to enact this leg-"islation, assuming that it vests the power claimed, "on behalf of the defendant?'
>
> "That Congress possesses the power to enact leg-"islation of this nature, under the Constitution, can-"not be questioned at this day. There are several "grounds upon which it must be sustained.
>
> "(1) In *McCulloch v. Maryland*, 17 U. S. (4 "Wheat.) 316, 421 (D. L. Ed. 579), Chief Justice "Marshall, delivering the opinion of the Court, it

"was held as a proper canon of the interpretation "of the powers of Congress under the National Con- "stitution, among others:

" 'Let the end be legitimate, let it be within the "scope of the Constitution, and all means which are "appropriate, which are plainly adapted to that end, "which are not prohibited, but consist with the letter "and spirit of the Constitution, are constitutional.'

"This rule of construction has never been doubt- "ed or questioned by any subsequent decision, but "has been uniformly followed whenever it has been "before the Courts, and must, therefore, be accept- "ed as elementary in the construction of the Na- "tional Constitution. That there is nothing in the "Constitution prohibiting Congress from determin- "ing the *venue* in civil actions is beyond question.

"Article 1, par. 8, cl. 11, of the Constitution, "grants Congress the power to declare war, and "clause 12 of that section empowers it to raise and "support armies. That, by virtue of these provi- "sions of the Constitution, Congress may use all "means which are, in its opinion, appropriate to that "end and not prohibited by some provision of the "Constitution, has, under the rules established in "*McCulloch v. Maryland*, been settled in *Miller v.* "*United States*, 78 U. S. (11 Wall.) 268, 20 L. Ed. "135, and *Stewart v. Kahn*, 78 U. S. (11 Wall.) 493, "506, 507, 20 L. Ed. 176; reaffirmed in *Mayfield v.* "*Richards*, 115 U. S. 137, 5 Sup. Ct. 1187; 29 L. Ed. "334. In *Stewart v. Kahn*, it was held:

" 'The measures to be taken in carrying on war "and to suppress insurrection are not defined. The "decision of all such questions rests wholly in the "discretion of those whom the substantial powers "involved are confided by the Constitution. In the

"latter case the power is not limited to victories in "the field and the dispersion of the insurgent forces. "It carries with it inherently the power to guard "against the immediate renewal of the conflict and "to remedy the evils which have arisen from its "rise and progress.'

"The same principle was recognized in the *Legal "Tender* cases, 79 U. S. (12 Wall.) 457, 539 (20 L. "Ed. 386), where it was held:

" 'Before we can hold the Legal Tender Acts un- "constitutional, we must be convinced they were not "appropriate means, or means conducive to the exe- "cution of any or all of the powers of Congress, or of "the Government, not appropriate in any degree (for "we are not judges of the degree of appropriate- "ness), or we must hold that they were prohibited. "This brings us to the inquiry whether they were, "when enacted, appropriate instrumentalities for "carrying into effect or executing any of the known "powers of Congress, or of any department of the "Government. Plainly to this inquiry, a considera- "tion of the time when they were enacted, and of "the circumstances in which the Government then "stood, is important. It is not to be denied that "acts may be adopted to the exercise of lawful pow- "er, and appropriate to it, in seasons of exigency, "which would be inappropriate at other times.'

"See also the address of former Justice Hughes "on the *War Powers Under the Constitution*, 42 "American Bar Association, 232.

"Whether the exigencies existed when Congress "enacted this statute was for that body to deter- "mine, and cannot be questioned by the Courts, if "there is any substantial ground therefor. *McCul-*

"*loch v. Maryland, supra; Lottery cases*, 188 U. S. "321, 355, 23 Sup. Ct. 321, 47 L. Ed. 492; *McDer-* "*mott v Wisconsin*, 228 U. S. 115, 128; 33 Sup. Ct. "431; 57 L. Ed. 754; 47 L. R. A. (N. S.) 984; An. "Cases, 1915A, 39. That there was substantial "ground for the enactment of the statute requires "no argument. The conditions so graphically de- "scribed in the *Legal Tender cases*, 79 U. S. (Wall.) "540, 20 L. Ed. 286, prevail now, and it will con- "duce to brevity to refer to what was there said, "without quoting it in its opinion.

"That the Act was enacted under the war power "is not only apparent from its context, but it is "expressly declared in Section 16 of the Act, 'to be "emergency legislation, enacted to meet conditions "growing out of war,' and Section 14 provides that "the Federal control of railroads shall continue not "exceeding one year and nine months after the rat- "ification of the treaty of peace.

"(2) Another ground upon which the Act must "be sustained is that the right to maintain an ac- "tion in any particular Court is always subject to "the legislative will. It is only when one is de- "prived of all rights to maintain an action for the "redress of his wrongs that the statute would be "obnoxious to the Fifth Amendment to the Consti- "tution. Congress has uniformly exercised that "power by providing in what Courts suits may be "maintained, and in no instance has such an Act "been held void. Among the many is Act of March "3, 1873, c. 226, 17 Stat. 509, authorizing the Attor- "ney General to institute suits against the Union "Pacific Railroad Company, for certain acts, in any "Circuit Court of the United States. The constitu-

"tionality of this Act was sustained in *U S. v. Union "Pacific R. R.*, 98 U. S. 569, 25 L. Ed. 143. The "Carmack Amendment to the Interstate Commerce "Act, approved June 29, 1906 (34 Stat. 595, c. 3591, "par. 7, pars. 11, 12 (Comp. Stat. 1916, par. 8604a, "8604aa), authorizes an action against the receiv-"ing carrier, regardless of the fact that the loss or "damage sued for was caused by a connecting car-"rier. Its constitutionality was sustained in *Atlan-"tic Coast Line v. Riverside Mills*, 219 U. S. 186, "31 Sup. Ct. 164, 55 L. Ed. 167, 31 L. R. A. (N. S.) "7, Act Feb. 24, 1905, c. 778, 33 Stat. 811 (Comp. "1916, par. 6923) vested the exclusive jurisdiction of actions on bonds of contractors for the con-"struction of public works in the Courts of the dis-"trict in which said contract was to be performed "and executed. The validity of the Act was sus-"tained in *United States v. Congress Construction "Co.*, 222 U. S. 199, 203; 32 Sup. Ct. 44, 56 L. Ed. "163; *Hopkins v. Ellington & Guy*, 246 U. S. 655, "38 Sup. Ct. 423, 62 L. Ed. 924, and *Ex parte South-"western Surety Ins. Co.*, 247 U. S. 19, 38 Sup. Ct. "430, 62 L. Ed. 961. The Clayton Act, approved "October 15, 1914, 38 Stat. 730, 737, c. 323, par. 12 "(Comp. St. 1916, par. 8835k), expressly authorizes "an action by the Government not only in the dis-"trict whereof the defendant corporation is an in-"habitant, but in any district where it may be found "or does business. Section 15 of that Act (Section "8835n) authorizes service of process on other par-"ties than the offending corporation who are prop-"erly joined in any district where found. The valid-"ity of these provisions was sustained in *Southern "Photo Material Co. v. Eastman Kodak Co.* (D. C.) "234 Fed. 955.

"Every State of the Union has provided by stat-
"ute the *venue* for civil actions in its Courts. In
"some States actions may be brought only in the
"county where the defendant resides; in some,
"where the defendant resides or may be found. Some
"actions can only be maintained in the county in
"which the cause of action is situated; and in some
"States actions may be maintained in the county
"where either plaintiff or defendant resides. The
"various acts are referred to in 22 Encyc. of Pa. &
"Pr. 790, *et seq.* In *United States v. Crawford* (C.
"C.) 47 Fed. 561, 565, Judge Parker said:

" 'I have no doubt that Congress may provide for
"service of process out of the district, as this is a
"regulation of practice and subject to the legislative
"control.'

"This was cited with approval by Judge Morrow,
"in *United States v. American Lumber Co.* (C. C.),
"80 Fed. 309, and in *Sidney L. Bauman, etc., Co. v.*
"*Hart*, 192 Fed. 498, 113 CCA. 104.

"(3) Another ground upon which the provisions
"of the Act must be upheld is that the Courts of the
"United States, inferior to the Supreme Court, are
"not established by the Constitution, but owe their
"existence and powers to Congress alone. That they
"possess no powers not granted by an Act of Con-
"gress was determined as early as 1809 in *Bank of*
"*United States v. Deveaux*, 9 U. S. (5 Cranch.) 61;
"3 L. Ed. 38; and again, in 1812, in *United States*
"*v. Hudson*, 11 U. S. (7 Cranch.) 32, 3 L. Ed. 259,
"and uniformly adhered to ever since. A late case
"in which this ruling is reaffirmed is *In re Wisner*,
"203 U. S. 449, 455; 27 Sup. Ct. 150, 51 L. Ed. 264.
"That Congress may increase or diminish their pow-

"ers, or abolish them is beyond question. It has done "so a number of times. Judiciary Act, March 3, "1875, c. 137, 18 Stat. 470, extending the jurisdic- "tion of the Circuit Court of the United States ma- "terially. Act of March 3, 1887, c. 373, 24 Stat. "552, contracted it. The Judicial Code (Act March "3, 1911, c. 232, 36 Stat. 1087) increased it in some "respects and in others decreased it. By that Act "Congress abolished the Circuit Courts, and no one "ever questioned the exercise of these powers by "Congress. If Congress, by the Act under consid- "eration, has seen proper to authorize the contrac- "tion of the jurisdiction of the District Courts, by "limiting the Courts in which actions may be main- "tained, it has only exerted the power which has "been exercised ever since the enactment of the first "judiciary Act, in 1789 (1 Stat. 73, c. 20), by the "first Congress under the Constitution. Possessing "this power, Congress may well determine in what "Courts action may or may not be maintained.

"The Constitution confers on the Supreme Court "appellant jurisdiction, but 'with such exceptions "and under such regulations as Congress shall make.' "In *Ex parte McCardle*, 74 U. S. (7 Wall.) 506, 514, "19 L. Ed. 264, it was held that Congress could de- "prive that Court of appellant jurisdiction, and the "repeal of an Act of Congress granting appellant "jurisdiction in certain causes deprived the Court of "the power to review judgments in such actions. "This case has been followed as a correct interpre- "tation of the powers of Congress in all cases in- "volving this question decided since. *Murphy v.* "*Utter*, 188 U. S. 95, 109, 22 Sup. Ct. 776, 46 L. Ed. "1070. In *Dooley v. Pa. R. R. Co.* (D. C.) 250 Fed.

"142, Judge Booth passed upon an Act similar to this "and sustained it.

"The contention that the statute is void, because "vesting administrative officers with legislative dis- "cretion of power, is without merit. *Selective Draft* "cases, 245 U. S. 366, 389, 38 Sup. Ct. 159, 62 L. "Ed. 349, L. R. A. 1918c, 361, An. Cases 1918b, 856. "It is, therefore, clear that the Act, if it authorizes "these general orders, is within the power of Con- "gress under the Constitution.

"(2) Does the Act of Congress grant this power "to the President?

"Counsel for plaintiff contends that it does not, "relying upon that part of Section 10 of the Act, "which reads:

" 'Actions at law or suits in equity may be brought "by and against such carriers, and judgments ren- "dered as now provided by law.'

"In the opinion of the Court, all this quotation "means is that any person having a cause of action "shall not, by reason of this Act or any regulation "made thereunder, be deprived of the right to main- "tain it in a proper Court, if, under the State, Fed- "eral or Common Law, he is entitled to a legal rem- "edy. It does not mean, as claimed, that, having "a cause of action against the carrier, he has the "right to institute it in any form in which he could "have brought it before the passage of this Act. To "meet the exigencies existing during the war, Con- "gress has granted to the President the power to say "that one shall not maintain an action in a forum "where the natural effect of selecting such forum "will be, in the language of General Order No. 18:

" 'That men operating trains engaged in hauling

"war materials, troops, munitions or supplies are re-
"quired to leave their trains and attend Court, as
"witnesses, and travel sometimes for hundreds of
"miles from their work, necessitating absence from
"their trains for days, and sometimes a week or
"more, which practice is highly prejudicial to the
"just interests of the Government and seriously in-
"terferes with the physical operation of the railroad,
"and the practice of suing in remote jurisdictions
"is not necessary for the protection of the rights of
"the just interests of plaintiffs.'

"That the exercise of the right to maintain actions
"in a forum distant from the place where the wit-
"nesses reside will seriously interfere with the suc-
"cessful prosecution of the war, cannot be opened to
"doubt. How are the soldiers drafted under the
"Selected Draft Act to be transported from the in-
"terior to the seaports if the operation of trains is
"to be interfered with in this manner? How are
"munitions, clothing, food, coal and other supplies
"necessary to carry on the war to be transported
"expeditiously if the employees, without whom trains
"cannot be operated, are to be compelled to leave
"their employment to attend as witnesses at places
"hundreds of miles away from where their duties
"require them to be, whenever a person has, or
"imagines he has, a cause of action against the car-
"rier, and for his convenience, or in some instances,
"perhaps, to prevent a proper defense, institutes the
"action in a Court far distant from the district
"where the cause of action arose, and in a district
"other than that of the residence of the plaintiff, at
"the time of the accrual of the cause of action? The
"fact that not only the plaintiff, but his witnesses,
"can more conveniently attend the Court, if held at

"or near his home, or where the cause of action ac-
"crued, may well raise a doubt whether the selection
"of the foreign forum is always made in good faith.
"The amendment of General Order No. 18 by Gen-
"eral Order No. 18a was evidently intended to pre-
"vent a change of residence for the purpose of en-
"abling a suit to be brought at a distance from
"where the plaintiff resided at the time of the actual
"accrual of the cause of action, as is so frequently
"done to enable one to maintain an action in a nation-
"al Court, instead of in the Courts of the State of
"which the plaitiff and defendant were both citi-
"zens at the time of the accrual of the cause of ac-
"tion.

"(3) But, aside from this, statutes may not be
"construed by selecting some part thereof and disre-
"garding other parts. For a proper construction
"of a statute the whole of it must be read together,
"to ascertain the legislative intent. In the language
"of Mr. Chief Justice White, in *Van Dyke v. Cordoca*
"*Copper Co.*, 234 U. S. 188, 191, 34 Supreme Court
"884, 885, 58 L. Ed. 1273:

"'We may not, in order to give effect to those
"words, virtually destroy the meaning of the entire
"context; that is, give them a significance which
"would be clearly repugnant to the statute looked at
"as a whole, and destructive of its obvious intent.'

"The various provisions of an Act should be read
"so that all may, if possible, have their due and con-
"joint effect with repugnancy or inconsistency. *New*
"*Lamp Chimney Co. v. Ansonia Brass Co.*, 91 U. S.
"656, 662, 23 L. Ed. 336; *Aaron v. United States*,
"204 Federal 943, 123 CCA. 265.

"Applying this canon of construction to the Act,

"and giving effect to every part of it, as is our duty, "it is apparent, at once, how untenable this conten- "tion is. That part of Section 10 applicable to the "matter in controversy reads:

" 'Sec. 10. That carriers, while under Federal "control shall be subject to all laws and liabilities as "common carriers, whether arising under State or "Federal laws or at common law, except in so far as "may be inconsistent with the provisions of this Act, "or any other Act applicable to such Federal control "or with any order of the President.'

"Another provision of the Act is Section 9:

" 'And the President, in addition to the powers "conferred by this Act, shall have, and is hereby "given such other and further powers necessary or "appropriate to give effect to the powers herein and "heretofore conferred.'

" 'There is nothing in the General Orders under "consideration which deprives the plaintiff of her "right to maintain an action against the defendant, "but for reasons of public necessity, in a time of "war, these regulations were made, because, in the "opinion of the President and Director General, for "good and sufficient reasons, they are necessary to "prevent serious interference with the physical op- "eration of railroads under the control of the Gov- "ernment and employed in the prosecution of the "war. The Act and regulations may well be sus- "tained upon the ground that '*salus populi suprema "lex est*', 'The welfare of the people is the paramount "law.' "

In 253 Federal 676, *Cocker v. New York, O. & W. Ry. Co.*, U. S. District Judge Mayer, after saying:

"Several motions coming under General Orders 18, 18a and 26 have been disposed of by me from the bench without a written opinion, but I have stated orally my reasons for granting or denying motions, as the case may be."

dismissed still another case on the same ground. The syllabus of this opinion reads, in part:

"Suit against carrier while under Federal control, brought after promulgation of and contrary to General Orders Nos. 18 and 18a of the Director General of Railroads, in a county or district other than where the cause of action arose, or where plaintiff resided when it accrued, will be dismissed."

In 254 Federal 748, *Harnick v. Pennsylvania R. R.*, the orders here at issue, namely, Orders 18 and 18a, were not at issue, but another order, namely, Order No. 26, which is applicable to another class of cases, was being considered. Circuit Judge Manton, however, made these pertinent remarks in regard to the present question:

"'On August 29, 1916, Congress passed an Act "entitled "An Act making appropriation for the sup"port of the army for the fiscal year ending June "30, 1917, and for other purposes."'

'Act Aug. 20, 1916, c. 418, 39 Stat. 645 (Comp. "Stat. 1947a), which provides as follows:

"'The President in time of war is empowered "through the Secretary of War, to take possession "and assume control of any system or systems of "transportation, or any part thereof, and to utilize "the same, to the exclusion, as far as may be neces"sary, of all other traffic thereon, for the transfer of "transportation of troops, war material and equip"ment, or for such other purposes connected with the "emergency as may be needful or desirable.'

"Under this authority, on December 26, 1917, by "a proclamation of the President, the Government "took possession and assumed control, on the 28th "of December, 1917, of each and every system of "transportation and appurtenances thereof, located "wholly or in part, within the boundaries of the "continental United States. This proclamation di- "rected:

" 'That the possession, control, operation and util- "ization of such transportation systems hereby by "me undertaken shall be exercised by and through "Wm. G. McAdoo, who is hereby appointed and is "designated Director General of Railroads.'

"By Act of Congress, March 21, 1918, c. 25 (Comp. "St. 1918, par. 3115¾ a-3115¾), the President was "authorized and given

" 'such other and further powers necessary or ap- "propriate to give effect to the powers herein and "heretofore conferred.'

"The President's proclamation of December 26, "1917, provided:

" 'Until and except so far as said director shall "from time to time otherwise by general or special "orders determine, such systems of transportation "shall remain subject to all existing statutes and or- "ders of the Interstate Commerce Commission, and "to all statutes and orders of the regulating commis- "sion of the various States in which the said systems "or any part thereof may be situated. **BUT ANY "ORDERS, GENERAL OR SPECIAL, HEREAF- "TER MADE BY SAID DIRECTOR SHALL HAVE "PARAMOUNT AUTHORITY AND BE OBEYED "AS SUCH.'**

"Section 10 of the Act of March 21, 1918, pro-"vides:

" 'That carriers while under Federal control shall "be subject to all laws and liabilities as common car-"riers, whether arising under State or Federal laws "or at common law, except in so far as may be incon-"sistent with the provisions of this act or any part "applicable to such Federal control, **or with any or-"der of the President.** Actions at law or suits in "equity may be brought by and against such car-"riers and judgments rendered as now provided by "law. * * *But no process, *mesne* or final, shall be "levied against any property under such Federal "control.' (Comp. Stat. 1918, par. 3115¾ j.)

" 'The jurisdiction of the District Court is limited, "and depends upon the statutory enactments of Con-"gress. Its jurisdiction may, therefore, be limited "by the same power which creates it. Congress has "given authority to the Director General, and the "President's proclamation provides, that any orders, "general or specific, made by the director, shall have "paramount authority and be obeyed as such. Like-"wise, it is provided that actions at law, or suits in "equity may be brought by or against such carriers "and judgments rendered as now provided by law. "This indicates clear intent to permit actions pend-"ing to be tried and action to be instituted there-"after. The right to pursue a remedy in a partic-"ular Court is not a vested right and may be re-"moved while an action is pending. *Railroad Com-"pany v. Grant*, 98 U. S. 398, 25 L. Ed. 231.' "

"The jurisdiction of the District Court is limited "and depends upon the statutory enactments of Con-"gress. Its jurisdiction may, therefore, be limited by

"the same power which creates it. Congress has "given authority to the Director General and the "President's proclamation provides that any orders, "general or specific, made by the Director shall have "paramount authority and be obeyed as such. Like-"wise, it is provided that actions at law or suits in "equity may be brought by or against such carriers "and judgments rendered as now provided by law. "This indicates clear intent to permit actions pend-"ing to be tried and action to be instituted there-"after. The right to pursue a remedy in a particu-"lar Court is not a vested right and may be removed "while an action is pending. *Railroad Co. v. Grant*, "98 U. S. 398. The right to stay an action pending "under Order No. 26, however, is dependant upon "whether the interest of the Government be preju-"diced by a present trial of a pending suit, and there "must be a showing of prejudice by reason of a pres-"ent trial."

Dooley v. Pennsylvania R. R. Co. (Chicago, St. P., M. & O. Ry. Co., *et al.*, Garnishees), 250 Federal 142:

"Under Act August 29th, 1916, c. 418, par. 1, 39 Stat. 645, providing that the President in time of war is empowered, through the Secretary of War, to take possession and assume control of any system or systems of transportation, and to utilize the same to the exclusion, as far as may be necessary, of all other traffic for the transfer and transportation of troops, etc., or for such other purposes connected with the emergency as may be needful and desirable, the clause of the President's proclamation relative to governmental control of railroads, dated December 26th, 1917, declaring that, except with the prior written assent of the Director General, no attachment by *mesne* process or on execution shall

be levied against the property used by any of said transportation systems in the conduct of their business as common carriers, was warranted, for what is implied in a statute is as much a part of it as what is expressed, and, when a power is conferred, everything necessary to carry it out and make it effectual will be implied, and it is obvious that governmental control of railroads, to be effective, should be exclusive, and not subject to interference by private parties."

Johnson v. McAdoo, Director General of Railroads, et al., 257 Federal 757:

"It was competent for the Federal Director General of Railroads to stipulate in what jurisdiction he might be sued, but his authority to make rules and regulations did not authorize the setting aside of the plain provisions of Act March 21, 1918, (Comp. Stat. 1918, Par. 3115¾a, 3115¾p) as to the railroad companies."

Nash v. Southern Pacific Co., 260 Fed. 280:

"General Order No. 50 of the Director General of Railroads, in requiring all actions and suits on claims for death or injury to person, or loss or damag to property, growing out of the possession, use, control, or operation of any railroad by the Director General of Railroads, which might, but for Federal control, have been brought against the carrier company, to be brought against the Director General, is within the authority lawfully conferred on the President by Federal Control Act, Mch. 21, 1918 (Comp. St. 1918, Par. 3115¾a, 3115¾p) and is not inconsistent with Section 10 of said Act." * * *

See also 250 U. S. 135, *Northern Pacific Railroad v. The State of North Dakota*, where this Court construed the

Transportation Act, particularly Section 10 as giving powers to the Director General paramount to State authority in Rate Matters.

The next case to which we wish to call the Court's attention is the case of *Rhodes v. Tatum*, which was decided by the Court of Civil Appeals for the State of Texas, in 1918. In this case, the judge of the lower court had held orders 18 and 18a valid, and had refused to hear a case brought in a jurisdiction other than the jurisdiction designated by those orders. The plaintiff thereupon sought by mandamus to compel the hearing of the case, and the Court of Civil Appeals refused the mandamus. The syllabus reads as follows:

206 S. W. 114, *Rhodes v. Tatum* (Texas, 1918):

"Under Act of Congress of August 26, 1916, empowering the President to take possession of systems of transportation, and Act of March 21, 1918, as to operation of transportation systems under Federal control Section 9 of which gives the President all powers necessary or appropriate to give effect to this power of regulation and control, the President's appointment of a Director General and the orders of the Director General Nos. 18, 18a and 26, in effect requiring suits against carriers under Federal control to be brought in the county where plaintiff resided at the time of the injury, or where the cause of action arose, and prohibiting trial of a suit brought in any other county, are valid.

"Congress may authorize an executive officer to make such rules and regulations as may be necessary to the efficient execution of the laws, though their enforcement depends upon conditions to be ascer-

tained by him and the exercise of his sound discretion.

"Act of Congress August 29, 1916, empowering the President to take possession of systems of transportation, and Act of Congress March 21, 1918, as to operation of transportation systems under Federal control, General Order 18 of the Director General of Railroads, General Order No. 18a and General Order No. 26, which relate only to the remedy of a person injured and desiring to sue, are not subject to the objection that they are *ex post facto* or retroactive."

We also call the Court's attention to the following cases: 179 N. Y. Sup. 310, *Russ v. N. Y. Central*, decided December 29, 1919. The syllabus reads:

"Under order of Director General of Railroads of April 18, 1918, personal injury action against railroads and Director General of Railroads should have been brought in county in which accident took place or in which plaintiff and witnesses resided, and when brought in another county defendants were entitled to change of place of trial without conditions, notwithstanding laches in making of motion.

"Court will recognize the policy of the Government to interfere as little as possible with the convenience of parties and witnesses in suits brought against railroads while under Government control. (See also 180 N. Y. Sup. 618, *Klein v. Director General.*)

We respectfully submit that the reasons given in the foregoing pages are unanswerable. The Congress of the United States as a war measure, took over the transportation system of the country and handed them over to the President

or his representative, the Director General, for administration. The Director General found that as a war measure, it was essential that these carriers should be sued only in stated jurisdictions, for the reason that to permit suits elsewhere would be a distinct detriment to the service and an interference with the prosecution of the war. The right of Congress thus to act has not been questioned by the Supreme Court of Mississippi, although it was questioned by the plaintiff in this case. The Supreme Court of Mississippi confined itself to contending that Congress had not acted. Section 10 of the Federal Control Act which we have quoted *supra*, states plainly that the carriers while under Federal control shall be subject to all laws and liabilities as common carriers, except in so far as may be inconsistent with any order of the President; that is to say, the Act specifically says that the President (and for the purposes of this discussion, the Director General is the President), shall have the right to issue an order exempting the carriers while under Federal control from the operation of State or Federal laws. This is what the Director General has done to a very limited extent in issuing Orders Nos. 18 and 18a. Those orders are entirely reasonable, are within the scope of his authority and are predicated upon sound judgment. Indeed, this Court will find by reference to its decision in the case of the *Southern Railway Co. v. Simon*, 236 U. S. 130, that it has itself strongly intimated that causes of action against carriers should not be brought indiscriminately but should be brought in the jurisdiction either of the plaintiff's domicile or of the Court where the accident occurred.

We respectfully submit, therefore, that the decision of the Supreme Court of Mississippi should be reversed and remanded for trial.

Respectfully submitted,

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April, 1920.

Office Supreme Court, U. S.
FILED
AUG 31 1920
JAMES D. MAHER,
CLERK.

No. 355

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1920

ALABAMA AND VICKSBURG RAILWAY COMPANY, ET AL.,

versus

SMITH JOURNEY.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

ROBERT B. MAYES,
J. A. TEAT,
CHALMERS POTTER,
CLAYTON D. POTTER,
Counsel Opposing Petition.

TUCKER PRINTING HOUSE, JACKSON, MISS.

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In the Supreme Court of the United States

OCTOBER TERM 1920

ALABAMA AND VICKSBURG RAILWAY COMPANY, ET AL.,

versus

SMITH JOURNEY.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

BRIEF OPPOSING PETITION FOR CERTIORARI.

The question presented by this record is as to whether or not Orders 18 and 18a are involved in a decision of this case, and if it be held that they are, then as to the power of the Director General of Railroads to issue Orders No. 18 and 18a.

Section 10 of the Act of Congress known as the Federal Control Act, approved March 21st, 1918, is in part as follows, viz:

> "Section 10. That carriers while under Federal control shall be subject to all laws and liabilities as common carriers, whether arising under State or Federal laws, or at common law, except in so far as may be inconsistent with the provisions of this Act

or any other Act applicable to such Federal control, or with any order of the President. Actions at law and in equity shall be brought by and against such carriers and judgments rendered as now provided by law, etc."

After the passage of the above Act the Director General of Railroads on April 9th, 1918, promulgated Order No. 18. Without copying the order in full, we give the main part of it, which is as follows, viz:

> "Ordered that all suits against carriers while under Federal control must be brought in the county or district where the plaintiff resides, or in the county or district where the cause of action arose."

This was followed by Order No. 18a, which provided:

> "That all suits against carriers while under Federal control must be brought in the county or district where the plaintiff resided at the time of the accrual of the cause of action, or in the county or district where the cause of action arose."

This last order was issued on April 18th, 1918.

In October, 1917, Smith Journey was injured by the negligent act of the Alabama & Vicksburg Railroad Company. It is seen that *the injury was sustained and the cause of action accrued before the proclamation of the President taking over the roads on December 31, 1917, and before the Federal Control Act of March 21st, 1918*, and the suit is against the corporation and the liability is that of the corporation, and if this judgment is paid it will be paid out of the private funds of the corporation and not out of any funds earned or because of any liability incurred during the period of Federal control. The

Director General of Railroads is not a party to this suit and could not have been made a party. *The suit was instituted in the county where the cause of action accrued, but in a different circuit court district of the same county.* The suit was instituted against the Alabama & Vicksburg Railroad Company on the 30th day of April, 1918. When the case came on for hearing in September, 1918, counsel representing the Railroad filed a plea in abatement, relying solely on the Orders No. 18 and 18a issued by the Director General as the ground for sustaining the plea in abatement. The record fails to show any application was made to the trial court, or any attempt to show that the trial of this case at that time and place would in any way embarrass the full and free operation of all trains on this road.

Counsel relied solely on Orders 18 and 18a without any other showing of any kind, and so relied on the above orders in a case where the cause of action accrued before Government control, and when the liability was solely that of the corporation. This plea in abatement was overruled, and the Railroad defended by proper pleas, and went to trial on the merits, the case was heard in the trial court on the merits and a judgment rendered in favor of plaintiff. This judgment was appealed to the Supreme Court of the State of Mississippi, and there affirmed. See *Alabama & Vicksburg Railroad Company vs. Smith Journey*, 84 S. R. 706. This completes the history of the case.

We notice in the statement of the facts by counsel for petitioner some very extravagant assertions which we do not think concern the questions of law presented for decision to this Court; assertions that find no basis in any fact that appears in this record. For instance, on

page 7 of their petition they state that: "The objection to the jurisdiction or plea in abatement was not a mere technical objection, it was made in good faith because of the inconvenience and detriment to the service resultant from having to transport witnesses to a point off the line of railroad, and also because the jurisdiction selected by plaintiff was notoriously hostile to interstate carriers."

Now there is not a syllable in the record even hinting that the place where this suit was brought was "notoriously hostile to interstate carriers." If this statement is correct, the Mississippi law provided ample remedy for a change of venue without resorting to Orders 18 and 18a. See Section 712, Mississippi Code of 7906. If any inconvenience or detriment resulted to the service by having to transport witnesses to the place of trial, which was in the same county, such fact was not brought to the attention of the court in any manner. We have ample provision in the statutes of the State for the continuance of cases on any good showing made therefor. See Section 784, Mississippi Code of 1906. We would not notice these assertions of counsel as it is our conception that they are unfounded and wholly irrelevant, but if made they are made with some purpose, and we reply only to show that the record does not sustain the assertion, but if it did ample remedy was offered by the statutes of the State to correct it, but that counsel for petitioner did not invoke the statutes or seek any relief thereunder.

Counsel for petitioner further go into a lengthy statement of facts purporting to give the merits of this controversy. The question of liability is wholly one to be determined by the State Court, and both the trial court

and the Supreme Court of the State have passed upon this liability and sustained it. This Court will presume that the judgment of the State Courts on all questions of fact and legal liability under the state law is correct. We shall make no further answer to counsel for petitioner on the facts, but confine our argument to the sole questions we think involved in the case.

The Supreme Court of the State of Mississippi in the case of *Alabama & Vicksburg Railroad Company vs. Journey*, 84 S. R., page 706, says in its opinion in the outset that: "That we do not think that the Court erred in the trial of the case upon its merits."

This case, we think, turns upon the following questions, viz:

First: Can Order 18 and 18a be made to apply to a cause of action against a carrier, when the cause of action is against the corporation itself, and accrued before Government control?

Second: Did the Director General have power, under the Federal Control Act, to make Orders 18 and 18a?

Third: Where petitioners plead to the merits after the demurrer to this plea in abatement was sustained, did not this waive any right they had to further object to the venue, or trial in the district in question?

We will discuss the above questions in the order stated.

FIRST: CAN ORDER 18 AND 18A BE APPLIED TO A CAUSE OF ACTION AGAINST A CARRIER, WHEN THE CAUSE OF ACTION IS AGAINST THE CORPORATION ITSELF, AND ACCRUED BEFORE GOVERNMENT CONTROL?

If Orders 18 and 18a cannot be applied to causes of action accruing before Government control, then, of course, the validity of the orders are not drawn in question by this suit.

In the case of *Benjamin Moore vs. Atchison T. & S. F. Ry. Co.*, 174 N. Y. Sup. 60, the Court said:

> "The President and his agents had, therefore, no power to make any order whereby a right of action already existing would be extinguished or cut off. If such be the effect of General Order No. 18 as amended, then I must hold that it was, to that extent, an order beyond the power of the Director General, or the agent of the President to make. Furthermore, a reading of the paragraph above quoted leads to the conclusion that Congress did not intend to authorize the President or his agents to make orders affecting the jurisdiction of the state courts, or affecting the right to maintain actions therein, since it is expressly provided, without qualification of any kind, that actions at law and suits in equity may be brought against carriers, and judgments rendered 'as now provided by law'. The order of the President mentioned in the first sentence of the paragraph seems to be those affecting liability. If the delegation of power to the executive branch of the Government be valid, a question which I do not decide, the President or Director General may make orders affecting liabilities to arise in future. But, once a liability arise, it may, by express command of the statute, be prosecuted in the same manner as it could have been had the statute not been enacted."

In the case of *West vs. New York, N. H. & H. R. R. Co.*, 123 N. E. 621, the Massachusetts court had on review Orders No. 18 and 18a. The plaintiff in the above suit brought suit for a breach of contract. The cause of action accrued on July 14th, 1917. We understand from the facts stated in the above case that the suit was instituted in violation of Orders 18 and 18a. The court says in its opinion on page 622: "It becomes necessary to decide whether the order of the Director General deprived the Court then sitting for Suffolk County of jurisdiction." The Court then proceeds at length to discuss the various statutes and proclamations, and concludes its discussion with this statement (See page 624), viz:

> "The last paragraph of this order was amended by a general order dated April 18th, 1918, designated as 18a which previously has been quoted. It is to be noticed that the order as amended is based on the Act of Congress of March 21st, 1918, but the authority of the Director General to act rests on his appointment by the President. It is manifest, although no attachment or levy can be made, that neither of the resolutions, the proclamation thereunder, nor the subsequent statute prohibits action for damages in accordance with the civil procedure prescribed by the states. The order of the Director General having been issued after the plaintiff's action had been begun is therefore inapplicable and the plaintiff could resort to any court of competent jurisdiction for redress although no attachment on mesne process could be made, and if he obtained judgment no execution could be levied on the defendant's property. It follows that this cause of action being transitory and not local the plaintiff can

bring suit in this county where the defendant has a usual place of business and under the terms of the report the defendant is to answer over."

We might argue in this case that the objection raised by the plea in abatement is more technical than substantial as the case is brought in the same county, and the fact that defendant is sued in the district in question is proof of the fact that defendant was localized in the district and had a usual place of business therein, but our conception of the case is that these things are beyond the real question that this Court is called upon to decide. Our idea is that only three questions are involved. Is this order valid? If so, does it apply to causes of action accruing before it was made? Does the fact that defendants pleaded to the merits after a demurrer was sustained to the plea in abatement waive the right to now insist upon it? All these questions are purely questions of law.

If the Director General can validly promulgate Orders No. 18 and 18a he can upset the jurisdiction of every court in the State. He could appoint one place in the State for the hearing of all cases against a carrier. He could designate the District of Columbia as the only place where a cause could be tried. If the Director General had the power to make this order at all, the power is unlimited and extends as far as in his judgment the interest of the public might demand. There were limitations upon the power of the Director General to promulgate orders destroying existing rights and nullifying the jurisdictions of State courts.

The Act of March 21, 1918, says: "Actions at law or suits in equity may be brought by and against such carriers and judgments rendered as now provided by law."

The above Act clearly retained the rights of all litigants to continue to bring suits "as now provided by

law", not "as may hereafter be fixed by the Director General." The Act kept alive all rights under the law existing at the date of the passage of the Act to the same extent as if the Act had never been passed. The Director General was not a party to this litigation; the Government was not affected by it; the railroad corporation will pay the judgment if it is finally decided against it, and the cause of action arose before Government control.

The cases discussing this question are necessarily few, but such cases as we have found sustain the contention that Orders No. 18 and 18a do not affect causes of action arising before Federal control, and suits wherein the Director General cannot be affected in any way as the Federal Government is not to be called upon to pay anything.

In the case of *McGregor vs. Great Northern Ry. Co.*, 172 N. W., it is held that General Order No. 50 is void as involving an unwarranted deprivation of the plaintiffs alleged cause of action, and as being in conflict with the Acts of Congress passed to meet war emergencies. In the above case it appears that the plaintiffs cause of action accrued in January, 1918, prior to the passage of the Act of March 21, 1918, and the court held that the cause of action had vested in the plaintiff prior to the passage of the Railroad Control Act of March 21, 1918, and was not affected by it. The above case discusses the Railroad Control Act at length, and further holds that the carrier corporations, during the period of Federal control, remained legal entities capable of suing and being sued.

The Court further said on page 843:

"At the time of the injury upon which this action is predicated, control had been assumed by the President under an Act which did not purport to limit in any degree the rights of the public in their relations with the carriers, except to the extent necessary to permit the full use of the transportation facilities. The statute was very brief, and apparently was designed to authorize control for military purposes and related to emergencies. Under the President's proclamation of December 31, 1917, it was expressly provided that 'Suits may be brought by and against said carriers and judgments rendered as hitherto until and except as far as said Director may, by general or special orders otherwise determine.' Such was the status of Federal control at the time the alleged cause of action arose, and it was the same at the time of the passage of the Act of March 21, 1918."

The Court then proceeds to hold that General Order No. 50 is a nullity, and that the Act of March 21, 1918, has no application to a cause of action accruing on January 22, 1918.

In the case on trial the cause of action accrued in October, 1917, before the proclamation of the President of December 31, 1917, and before Federal control had been assumed in any manner or form.

In the case of *Angle vs. Chicago, St. Paul & Milwaukee Ry. Co.*, 38 Law Ed. U. S. Reports 55, it is held that a right of action to recover damages for injury is a vested right and beyond the power of legislative action to destroy. When this right of action was vested in Journey he had the right to institute this suit where it was instituted and when the Act of March 21, 1918, was enacted

it preserved all rights against carriers that existed "as now provided by law", and the Director General was not authorized to change that declaration of Congress by the issuance of Orders 18 and 18a. If they could relate back and destroy that vested right to bring this action "as now provided by law", the effect is to permit the Director General to repeal and nullify that part of the Act of March 21, 1918.

In the case of *Wenfree vs. Northern Pacific Ry. Co.*, 57 Law Ed. U. S. 518, the Court held that a retroactive effect will not be given to the Federal Employees Libbility Act of April 22, 1908, so as to make its provisions applicable to a cause of action which accrued before its passage.

In the case of *Ettor vs. City of Tacoma*, 57 Law Ed. U. S. 773, the Court held that the right of abutting owners to consequential damage arising from an original street grading under municipal direction given by the Washington law was a vested property right and could not be defeated by a repeal of the laws. It is a universal rule that laws are prospective in their operation unless it clearly appears that the legislature intended them to have a retroactive effect. Such cannot be said of the Act of March 21, 1918. We earnestly contend that no Federal question is involved in this case because the Orders of the Director General were not involved, because they were not applicable to a cause of action arising before Federal control.

SECOND: ORDERS 18 AND 18A ARE INVALID BECAUSE IN CONFLICT WITH SECTION 10 OF THE ACT OF MARCH 21ST, 1918.

The Act provides that "actions at law or suits in equity may be brought by and against such carriers and judgments rendered as now provided by law."

Actions may be brought *as* now provided by law, so says the statute. When it was passed the law provided that this action could be brought where it was commenced, but the orders complained of in effect say that you shall not bring "actions as now provided by law" as the statute says, but you must bring such actions "as I shall now provide by Orders 18 and 18a."

To state the case seems to conclusively show that the Orders are violative of the statute and a nullity, and many courts so hold. In fact nearly all Courts of last resort deciding this question have held invalid Orders 18 and 18a. The Supreme Court of the State of Mississippi in the Journey case, the one we now consider, said the following:

> "If Order No. 18, issued by the Director General of Railroads, is a valid exercise of power vested in him, the plea in abatement of this action is good. The order manifestly was intended to, and does, limit the right to maintain the action at this time to the district where the injury occurs, or the district of plaintiff's residence, where there are more than one district with the jurisdiction of the particular court, limiting the venue to the place of jurisdiction of the injury, or the jurisdiction of plaintiff's residence.
>
> "The first clause of Section 10 of the Act of Congress of March 21, 1918, granting Federal control of railroads, relates to liability, and the words therein, 'or with any order of the President', refers to

orders governing rates, fares, classification, operation, and the general management of railroads, and their business, and are powers that may be and are delegated to the President of the Federal Control Act, and for damages arising by reason of a compliance with such orders no right of action can be maintained.

"The second clause of Section 10 of this Act provides: 'Actions at law or suits in equity may be brought by and against such carriers and judgment rendered as now provided by law.' The Act, clearly providing by said clause that actions at law may be brought against carriers as now provided by law, was intended to, and does, leave the venue of suits and the jurisdiction of courts as they were at the time of the passage of the Act.

"Order No. 18 undertakes to modify and limit the scope of this jurisdictional provision of Congress, and is the exercise of a power that is not, and that probably could not be, delegated by Congress. Article 1, Paragraph 1, Const. U. S. *Where there is a showing that the trial would seriously interfere with the operation of the road, or in any wise interrupt the operation of trains engaged in hauling war material, troops, munitions, or supplies, or in any way prejudice the Government in the prosecution of the war, no right-thinking Court would hesitate to grant a continuance during the period of such condition.*

"Section 10 of the Act of Congress (U. S. Comp. St. 1918, U. S. Comp. St. Supp. 1919, Sec. 3115 3-4j) contains all the law pertinent to this case, and we copy same, viz:

"'Section 10. That carriers while under Federal control shall be subject to all laws and liabilities as common carriers, whether arising under State or Federal laws or at common law, except in so far as may be inconsistent with the provisions of this Act or any other Act applicable to such Federal control or with any Order of the President. Actions at law or suits in equity may be brought by and against such carriers and judgments rendered as now provided by law; and in any action at law or suit in equity against the carrier, no defense shall be made thereto upon the ground that the carrier is an instrumentality or agency of the Federal Government.'

"It seems clear to us that Congress did not delegate to the executive the power claimed by appellant, but in apt language left the law as it was before the passage of the statute." *Alabama & Vicksburg Ry. Co. vs. Journey*, 84 S. R. 706.

In discussing the effect of that part of Section 10 under discussion here, the Circuit Court of Appeals in the case of *Postal Teleg. & Cable Co. vs. Call*, 255 Fed. 851, said:

"Its effect is to limit the interference of Government control in the question of suits against carriers, whether at law or in equity, to the enforcement of the judgment or decree and not to interfere with the right of the plaintiff to obtain a judgment or decree against the carriers. It permits actions at law or in equity to be brought against carriers, and judgments to be rendered as now provided by law, and prohibits the carrier from defending upon the

> ground that it is an instrumentality or agency of the Federal Government. It provides, however, that the judgment or decree, when obtained, shall not be enforced, as against the property in Federal control, by process, mesne or final."

The Court declares in the above case that the effect of the Act is to limit the interference to the enforcement of the judgment, and leave other rights of the litigant untrammelled.

In the case of *Haubert vs. Baltimore & Ohio Ry. Co.*, 259 Federal 361, the Court in discussing Section 10 states:

> "The first sentence of this Section relates to liabilities, and the second to the manner in which they may be enforced. The second sentence of this Section permits actions at law or suits in equity to be brought and judgments rendered as now provided by law."

Our understanding of the above decision, and in fact our contention as to the interpretation of Section 10, that carriers under Federal control are subject to all laws and liabilities under both State and Federal law, not inconsistent with the Act, or any Order of the President. That the Order of the President may, in some instances, determine liability, but when any action is instituted to determine liability in any Court, that action may be instituted in any Court of competent jurisdiction "as now provided by law", and neither the President nor any agent is given authority to prohibit any person from bringing his action in any Court of competent jurisdiction.

In the case of *Louisville & Nashville R. R. Co. vs. Steele*, 202 S. W. 878, in discussing Section 10, the Court of Appeals of Kentucky said:

> "Obviously the effect of the foregoing provisions of the statute is to entirely suspend the right of issuing and levying executions, attachments, or other like process against the property of common carriers under Federal control during the continuance of such control; but it does not prevent a litigant from bringing his action against the latter in any Court of competent jurisdiction, or such court from granting him such relief in the form of a judgment or otherwise, short of the coercive payment or satisfaction of such judgment by the levy of an execution or other like process upon or against any property of the carrier, as the litigant might, but for the passage of the Act, under the laws of the State of his residence, have been entitled to."

The construction placed upon this Act is that the right to sue in any Court of competent jurisdiction under the laws of the State, where a suit is brought, is secured by this Act and no Order of any kind can take it away.

In the case of *Moore vs. A. T. & S. F. Ry. Co.*, 174 N. Y. Supplement 63, the Court declared Orders 18 and 18a invalid if it extinguished or cut off a cause of action already existing, and further said:

> "Once a liability arises, it may, by express command of the statute, be prosecuted in the same manner as it could have been had the statute not been enacted."

In the case of *El Paso & S. W. Ry. Co. vs. Lovick*, 218 S. W. 489, the Supreme Court of Texas in discussing Orders 18 and 18a said:

"On the date of the enactment of the Act of Congress, the law authorized the institution and maintenance of this suit in the District Court of El Paso County, Texas. Under these circumstances Congress expressly authorized the commencement and prosecution of this suit in that Court when it was enacted that actions at law, etc., may be brought, etc., against such carriers and judgments rendered as now provided by law. To avoid any substantial interference, as the result of the above clause, with the complete possession and control of the railroads of the United States, for which the Act provided, the Congress added 'But no process, mesne or final, shall be levied against any property under such Federal control' ", and the Court further said, "In so far as the terms of the General Orders No. 18 and 18a undertook to restrict the right granted by Congress to maintain a suit in any Court of competent jurisdiction, they cannot be upheld."

To the same effect is the case of *El Paso & S. W. Ry. Co. vs. Havens*, 216 S. W. 444.

In the case of *LaSalle vs. Northern Pacific Railroad Co.*, 172 N. W. 918, an attempt was made to enforce Order No. 50 of the Director General, which Order provided that in all suits against carriers, the suits should be instituted against the Director General and not the carrier. In reply to this contention the Court said:

"The Act of Congress of March 21, 1918, providing for the operation of transportation systems during Federal control, provides that actions at law may be brought against carriers and judgment rendered as now provided by law. Order No. 50 issued

by the Director General of Railroads October 28, 1918, required that actions for death or injury to person growing out of the possession, control or operation of any railroad by the Director General shall be brought against the Director General and not otherwise. In so far as such order prohibits the maintenance of such an action against the railroad company it is in conflict with the Act of Congress of March 21, 1918."

The Court further said:

"It seems clear that if the Act of Congress and an Order of the Director General are in conflict, the Act of Congress must prevail."

The same thing is decided in the case of *Franke vs. Chicago & N. W. Ry. Co.*, 173 N. W. 701. All these decisions are based upon the idea that when Congress gave the right to maintain actions at law, etc., "as now provided by law", that it meant what it said, and that suits that could have been maintained in jurisdictions existing at the time of the passage of the Act of March 21, 1918, could be maintained afterwards just as if the Act had never been passed. This is true of Order No. 50 and is equally true of Orders No. 18 and 18a.

In the case of *Johnson vs. McAdoo*, 257 Federal 757, the District Court held that under the Act of March 21, 1918, litigants could sue railroad companies under Federal direction just as they had been previously able to do and in such courts as had jurisdiction under the general law.

To the same effect is the case of *Jensen vs. Lehigh Valley Ry. Co.*, 255 Fed. 795.

In the case of *El Paso Ry. Co. vs. Lovick*, 210 S. W. 283, the Appellate Court of Texas declares Orders 18 and 18a invalid as being in violation of the Act of March 21, 1918.

In the case of *Frierson vs. Chicago R. I. & Pacific*, 254 Fed. 875, the Court declares Orders 18 and 18a invalid.

Turning our attention for a moment to the cases cited by counsel for petitioner, we desire to say that the case of *Rhodes vs. Tatum* cited in 206 S. W. 114 was decided by the Civil Court of Appeals of Texas, and afterwards overruled by the Supreme Court of Texas in the case of *El Paso Ry. Co. vs. Lovick*, 218 S. W. 489. Counsel for petitioner rely almost solely on the case of *Wainwright vs. Pa. R. R. Co.*, 253 Fed. 459. In fact nearly the whole of their brief is devoted to copying the very elaborate opinion of Judge Trieber. But we have shown that nearly every other Court has held the other way, and it seems to us that the decisions declaring invalid Orders 18 and 18a find a more logical predicate in the statute than does the decision of Judge Trieber.

Counsel next cite the case of *Harnick vs. Pa. Ry. Co.*, 254 Fed. 748. This decision was construing a different Order, and we do not concede the principle is the same. We contend that Orders 18 and 18a are invalid and in direct conflict with the Act of March 21, 1918, and should be so declared.

THIRD: PLEADING TO MERITS AFTER OVERRULING DEMURRER IS A WAIVER.

Our further contention is that when defendants plead to the merits and went to trial after the demurrer to the plea in abatement was sustained, they waived the right

to insist upon this objection. They must stand or fall upon this plea, and when the demurrer was sustained they should have permitted judgment to be taken, final, and appealed to the Supreme Court of the State. Under Section 33, Code of 1906, an appeal is allowed from any final judgment of the Circuit Court. Defendants cannot experiment with a plea, and when their experiment is disallowed, plead to the merits and have a trial on same, and after losing out on the merits, then insist that the case should be reversed because the Court erred in denying the plea in abatement. No order of the Court required them to plead to the merits; no statute of the State required this. It was their voluntary act. They could let judgment final be rendered and appeal, but they did not do this.

In 1 Corpus Juris, page 273, the rule is thus stated:

> "In some jurisdictions it is held that when a plea or other objection in abatement is overruled, defendant must stand by it if he would take advantage of the objection, and he waives it if he pleads in bar or otherwise appears to the merits. In other jurisdictions, however, this rule is not recognized, but defendant may have his exception to the ruling and plead over to the merits without waiver of objection."

This question is to be determined by the law of the State the practice of which is under review. In the State of Mississippi when this case was tried it is the law that one must stand or fall on the plea in abatement if advantage is to be taken of it on appeal, and where the plea is objected to in the trial Court and the objection sustained, a plea and trial on the merits is a waiver of any further right to object.

The case of *Memphis & Charleston R. R. Co. vs. Glover*, 78 Miss. 467, directly decides this as we understand the case.

In the Glover case just cited, Glover and others sued the railroad company for a violation of a Mississippi statute. The suit was against Chas. M. McGee and Henry Fink at the date of suit operating the railroad as receivers. The receivers demurred to the declaration, but the demurrer was overruled. Before any other steps were taken the railroad was sold. The original defendants pleaded their discharge, and the plea was adjudged valid. The plaintiffs then sought by appropriate pleadings to revive the suit against the railroad. The railroad appeared and moved to quash the proceedings on the ground that it was unauthorized by law. This motion was overruled and the railroad plead to the merits and a trial was had on same, resulting in a judgment against the railroad which prosecuted an appeal to the Supreme Court and undertook to avail itself of the matters it had sought to set up in abatement, and the Supreme Court of this State said in 78 Miss. 476:

> "But it is insisted that if the appellant be liable this suit cannot be revived against it by scire facias, and that Sec. 669 of the Code of 1892 does not authorize such revival, it being insisted that a receiver is not a person within the meaning of the Section similar to a public officer, trustee or commissioner. We do not think it material to consider, in the attitude of the pleadings in this case, whether technically or literally, the revival was proper under said Section 669, for the reason that after the appellant's motion to quash the scire facias was overruled it did not stand on the proposition that no such revival

could be had, allow judgment to be taken in the court below, and appeal to this Court, presenting that ground, but pleaded generally to its merits, both by its answer and by the plea of the general issue subsequently filed, and thus entered its appearance. This course was a complete waiver of any right to insist upon an improper revival by scire facias." * * * * "Whatever may be the true construction of Section 669 as to whether the appellant is the successor, so as to authorize a revival by scire facias, we think, for the reason above given, the appellant appeared to the merits, and was thus for all purposes in Court."

While it is true that the rule in the Federal Courts seems to be different from what we understand to be the rule in this State, as shown by the case of *Harkness vs. Hyde*, 25 Law Ed. U. S. 237. Also in the matter of *Indiana Trust Co.*, 61 Law Ed. U. S. 1253, *Hitchman Coal Co. vs. Mitchell*, 62 Law Ed. U. S. 260, yet this *only* applies to the Federal practice, and does not apply to States having a different practice as is expressly declared in the case of *Western Life Indemnity Co.*, 59 Law Ed. U. S. 220, in opinion to be found in second column of page 224 where this Court said:

"But the recognition and enforcement of the right on the part of defendants in Federal Courts is a matter quite apart from the authority of the States to establish a different rule of practice within their jurisdictions, as was expressly recognized in *York vs. Texas*, 137 U. S. 17, *Southern Pacific Co. vs. Denton*, 146 U. S. 202, *Mexican C. Ry. Co. vs. Pinckney*, 149 U. S. 194, *McLaughlin Bros. vs. Hallowell*, 228 U. S. 278."

In the case of the *Chicago Life Insurance Co. vs. Cherry*, 61 Law Ed. 966, this Court on page 969 said as follows, viz:

> "A Court that renders judgment against a defendant thereby tacitly asserts, if it does not do so expressly, that it has jurisdiction over the defendant. But it must be taken to be established that a Court cannot conclude all persons interested by its mere assertion of its own power (*Thompson vs. Whitman*, 18 Wall. 457, 87 L. Ed. 897), even where its power depends upon a fact and it finds the fact (*Tilt vs. Kesley*, 207 U. S. 43, 52 L. Ed. 95, 99, 28 Supt. Ct. Rep. 1). A divorce might be held void for want of jurisdiction although the libellee had appeared in the cause. *Andrews vs. Andrews*, 188 U. S. 14, 16, 17, 38, 47 L. Ed. 366, 367, 372, 23 Sup. Ct. Rep. 237. There is no doubt of the general proposition that, in a suit upon a judgment, the jurisdiction of the Court rendering it over the person of the defendant may be inquired into. *National Exch. Bank vs. Wiley*, 195 U. S. 257, 49 L. Ed. 184, 25 Sup. Ct. Rep. 70; *Haddock vs. Haddock*, 201 U. S. 562, 573, 50 L. Ed. 867, 871, 26 Sup. Ct. Rep. 525, 5 Ann. Cas. 1. But when the power of the Court in all other respects is established, what acts of the defendant shall be deemed a submission to its power is a matter upon which States may differ. If a statute should provide that filing a plea in abatement, or taking the question to a higher Court, should have that effect, it could not be said to deny due process of law. The defendant would be free to rely upon his defense by letting judgment go by default. *York vs. Texas*, 137 U. S. 15, 34 L. Ed. 604, 11 Sup. Ct. Rep. 9; *West-*

ern Life Indemnity Co. vs. Rupp, 235 U. S. 261, 272, 273, 59 L. Ed. 220, 224, 225, 35 Sup. Ct. Rep. 37. If, without a statute, a Court should decide as we have supposed the statute to enact, it would infringe no rights under the Constitution of the United States. That a party that has taken the question of jurisdiction to a higher Court is bound by its decision was held in *Forsyth vs. Hammond*, 166 U. S. 506, 517, 41 L. Ed. 1095, 1099, 17 Sup. Ct. Rep. 665."

The only thing this Court cares to examine is as to whether or not the defendant had a full and fair opportunity to present and have determined its plea in abatement. We have shown that it did, and that it could have relied upon it and prosecuted its appeal from the decision of the Court. As was said in the case of *Chicago Life Insurance Co. vs. Cherry*, 61 Law. Ed. 969: "The defendant would be free to rely upon this defense by letting judgment go by default."

Surely this defendant is not entitled to two trials on the merits. It was entitled to stand on its plea in abatement or abandon it and go to trial on the merits, and it chose the latter.

Surely it will be held to its choice. We contend that this certiorari should be denied because the cause of action arose before Federal control; because defendants have waived their right to insist upon the application of Orders No. 18 and 18a by pleading to the merit; and because the Director General had no power to pass any such order. Respectfully submitted,

Robt. R. Hayes
J. A. Teal
E. Lehman Pollak
Edward Lauterbach

Counsel Opposing Petition.

We certify that a copy of the foregoing brief was served on counsel for petitioner on this 23 day of August, 1920, and they signed an acknowledgment of service.

Robt B Mayo
J H Teal
Blalock & Blalock
Clayton & Clayton

Counsel Opposing Petition.

We acknowledge receipt of copy of foregoing brief on this ..... day of August, 1920.

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Counsel for Petition.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1921.

No. 55.

THE ALABAMA & VICKSBURG RAILWAY COMPANY ET AL., PETITIONERS,

versus

SMITH JOURNEY, DEFENDANT.

ADDENDA TO BRIEF FOR PLAINTIFF IN ERROR AND PETITIONER FOR CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI.

We respectfully call the court's attention to the following additional authorities on the point here at issue:

In Missouri Pac. R. R. Co. *vs.* Ault, No. 252, October term, 1920 (41 S. C. Reporter, 595) (not yet officially reported), this Court was dealing with a suit brought against a railroad corporation for wages and penalty for non-payment of wages sought to be recovered by an employee who was both hired and discharged during Federal control. The railroad corporation pleaded the act of 1916, the Federal

Control Act, section 10, and General Order No. 50 of the Director General.

The Court, speaking through Mr. Justice Brandeis, had occasion there to review the whole situation and, speaking of section 10 of the Federal Control Act, said, among other things:

Page 595:

> "The provision applies equally to cases where suits against the carrier companies were pending in the courts on December 28, 1917; to cases where the cause of action arose before that date and the suit against the company was filed after it and to cases where both cause of action and suit had arisen or might arise during Federal operation." * * *

Page 596:

> "It is this conception of a transportation system as an entity which dominates section 10 of the act. The systems are regarded much as ships are regarded in admiralty. They are dealt with as active responsible parties answerable for their own wrongs. But since levy or execution upon their property was precluded as inconsistent with the government's needs, the liability of the transportation system was to be enforced by allowing suit to be brought against whomever, as the party operating the same, was legally responsible under existing law, although it be the Government.
>
> "Thus, under section 10, if the cause of action arose prior to Government control, suit might be instituted or continued to judgment against the company as though there had been no taking over by the government, save for immunity of the physical

property from levy *and the power of the President to regulate suits in the public interest as by fixing the venue or the time for trial.*"[1] (Italics by present writer.)

The Court, in a note, citing among others the case of Wainwright *vs.* Penn. R. R., 253 F., 459, which is quoted from at length on page 19 *et seq.*, our brief of April, 1921.

270 Federal 280, *Ellis vs. A., B. & A. Ry. Co. et al.:*

This case was decided by the District Court for the Northern District of Georgia on January 21, 1921, Sibley, District Judge. The court said in part:

"According to the construction given in the *Westbrook case* to section 10, the sentence, 'Actions at law or suits in equity may be brought by and against said carriers, and judgments rendered as now provided by law,' applies to suits against the Director General and makes applicable to them the whole code of procedure formerly applying to railroad companies. This would include the matter of venue and the place where suits should be brought, in the absence of any controlling order by the President. Otherwise, prior to the issuance of such orders, there would be no provision on the subject. Accordingly, until the President, through the Director General, issued Order 18 and 18*a*, the venue of this suit against the Director General would have been in the district

[1] Muir *vs.* Louisville & Nashville R. Co., 247 Fed., 888; Wainwright *vs.* Pennsylvania R. Co., 253 Fed., 459; Di Tommaso *vs.* Railroad Co., 28 Pa. Dist., 473; Bolton *vs.* Hines, 221 S. W. (Ark.), 459; Le Clair *vs.* Montpelier, &c., R. Co., 106 Atl. (Vt.), 587; Benjamin Moore & Co. *vs.* Atchison, T. & S. F. R. Co., 174 N. Y. S., 69; Special Rules of Practice During Federal Control, 59 I. C. C., 797, 798.

of the principal office of the proprietary railroad company. But those orders undertook to locate suits against the Director General in the district either of the plaintiff at the time of the accrual of the cause of action or that in which the cause of action arose. This suit is filed in neither district, plaintiffs being citizens of Texas, and the cause of action arising in a State other than Georgia.

"These orders, while at variance with the implication of the sentence quoted from section 10 of the Control Act, are authorized by the language of section 9 (section 3115 ¾ *i*) and by the preceding sentence in section 10, that—

"'Carriers while under Federal control shall be subject to all laws and liabilities as common carriers, whether arising under State or Federal laws or at common law, except in so far as may be inconsistent with the provisions of this act or any other act applicable to such Federal control or with any order of the President.'

"Though this sentence relates rather to the existence of the liability than to the mode of its enforcement, it clearly authorizes the President to withdraw liability altogether to any extent to which he may find its existence incompatible with the purposes of the government control. The preamble to General Order 18 recites the incompatibility found to exist in answering suits in the old places of venue. If the President could withdraw liability altogether, he might limit it by conditioning the place of its enforcement. As the greater includes the less, this must be involved in the powers given him by Congress.

"And especially in time of war this is not an unconstitutional delegation of legislative power. Selec-

tive Draft Cases, 245 U. S., 366, 389; 38 Supreme Ct., 159; 62 L. Ed., 349; L. R. A. 1918C, 361; Ann. Case 1918B, 856, and cases cited. These orders have been sustained by courts which differ from the construction of section 10 made in the *Westbrook case*, and which have found it necessary to construe the orders as giving the whole foundation for suits against the Director General as a representative of the United States. See *Nash vs. Southern Pac. Ry.* (D. C., 260 Fed., 280; *Blevins vs. Hines, Director General* (D. C.), 264 Fed., 1005, as well as those whose construction approaches more nearly to that of the *Westbrook case*, as *Hines, Director General, vs. Dahn* (C. C. A.), 267 Fed., 105; *Mardis vs. Director General* (C. C. A.), 267 Fed., 171; *Wainwright vs. Penn. R.* (D. C.), 253 Fed., 459; *Johnson vs. McAdoo* (D. C.), 257 Fed., 757; *Hanbert vs. B. & O. R. Co.* (D. C.), 259 Fed., 361; *Rutherford vs. Union Pacific* (D. C.), 254 Fed., 880.

"It will accordingly be adjudged that the suit against the Director General be dismissed without prejudice."

Blevins vs. Hines, 264 Fed., 1005:

This case was decided by the District Court for the Western District of Virginia, on May 8, 1920, by McDowell, District Judge. Paragraph 1 of the head-note, which seems correctly to reflect the decision, reads as follows:

"Under Federal Railway Control Act, paragraph 8 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, par. 3115 3/4*h*), authorizing the President to execute the powers thereby conferred through such agencies as he may determine, the presidential proclamation of January 10, 1919, appointing a Director General of

Railroads, with authority to make all necessary orders, and General Order 50*a* of the Director General, requiring that actions for injuries from negligence of employees shall be brought against the Director General and not otherwise, the provision of section 10 of the act (section 3115 ¾*j*), that action shall be brought against the carrier, is abrogated and the carrier is not a proper party, as this provision was to be effective only if not inconsistent with any order of the President."

Respectfully submitted,

JULES BLANC MONROE,
MONTE M. LEMANN,
R. H. THOMPSON,
Attorneys for Plaintiff in Error.

Office Supreme Court, U. S.
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No. 2855

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1920

ALABAMA VICKSBURG RAILWAY COMPANY,
ET AL., *Petitioners and Plaintiffs in Error,*

vs.

SMITH JOURNEY, *Defendant in Error.*

REPLY TO BRIEF FOR DEFENDANT IN ERROR OPPOSING THE PETITION FOR CERTIORARI.

J. Blanc Monroe of New Orleans, Louisiana
Monte M. Lemann of New Orleans, Louisiana
Robert H. Thompson of Jackson, Mississippi,
Attorneys for Petitioners and Plaintiffs in Error.

TUCKER PRINTING HOUSE JACKSON MISS

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1920

ALABAMA VICKSBURG RAILWAY COMPANY, ET AL., *Petitioners and Plaintiffs in Error,*

vs.

SMITH JOURNEY, *Defendant in Error.*

REPLY TO BRIEF FOR DEFENDANT IN ERROR OPPOSING THE PETITION FOR CERTIORARI.

The able brief of the attorneys opposing the petition for certiorari does violence to the record and to the law of Mississippi, in so far as it contends that the railway company by pleading to the merits waived its plea in abatement, and lost the right to complain of the judgment sustaining a demurrer to said plea.

FIRST. THE CONTENTION VIOLATES THE RECORD.

The Supreme Court of Mississippi did not decide that the plea in abatement was waived or that the right to complain of its having been adjudged insufficient in law was lost by the railway company. On the contrary, that Court held that:

> "If Order No. 18, issued by the Director General of Railroads, is (was) a valid exercise of power vested in him, the plea in abatement of this action is good."

The judgment of the trial court sustaining the demurrer to the plea, setting up the Orders, Nos. 18 and

18A, of the Director General of Railroads, expressly granted the railway company leave to plead further and its order provided that the exception therein noted should be treated as a formal bill of exceptions to the ruling of the Court sustaining the demurrer to the plea. It is unreasonable to think that the Court wittingly allowed an exception to its ruling and at the same time and in the same order authorized the waiver of the exception.

The Supreme Court of Mississippi in its opinion in this case (84 So. Rep. 706) with approval quoted at length from the written opinion of the trial judge wherein he announced:

> "If Order No. 18, issued by the Director General of Railroads, is (was) a valid exercise of power vested in him, the plea in abatement of this action is good."

This finding was affirmed by the Supreme Court of Mississippi, and that too after the defendant railway company had pleaded to the merits, after the trial on its plea to the merits and after every thing had been done upon which opposing counsel now seek to predicate the alleged waiver presented by them in argument. The State Supreme Court decided that Order No. 18 was invalid. It cannot be inferred that the State Supreme Court would have based its decision upon a question, the right to present which had been waived by the party urging it. The State Supreme Court did nothing of the kind, it decided the Federal question presented by this record upon what the Court adjudged to be its merits, without effort to evade it.

SECOND. THE CONTENTION OF OPPOSING COUNSEL VIOLATES THE LAW OF MISSISSIPPI.

In *Kendrick vs. Watkins*, 54 Miss. 495, the Supreme Court of Mississippi decided (1877) that:

> "When a demurrer to a plea in abatement is sustained, the judgment is *respondeat ouster*, and the defendant may then plead to the merits."

This is the unquestioned law of that state. It has not, to our knowledge, been questioned since 1877. There is no reported decision, we have been able to find, affecting in any way the decisions in *Kendrick vs. Watkins, supra,* on the point for which we cite it.

The case of *Memphis & Charleston R. Co. vs. Glover,* 78 Miss. 467, relied upon by opposing counsel, is not in point and in no way affects the authority of *Kendrick vs. Watkins.* In the Glover case the receivers of a railroad while operating the road incurred a statutory liability and were sued by Glover therefor. Pending the suit that part of the railroad within the State of Mississippi was sold under the orders of the Court by which the receivers were appointed and by the terms of the sale the purchaser assumed and promised to pay any and all liabilities incurred by the receivers. After the sale the receivers were discharged, pleaded their discharge to Glover's suit and were dismissed therefrom. Whereupon Glover, the plaintiff in the suit, by *scire facias* sought to revive his action against the purchaser, the Memphis & Charleston Railroad Company. The purchaser appeared to the *scire facias,* the proceeding seeking the revival of the suit, and moved to quash the same. The purchaser did not plead in abatement and there was no demurrer to any pleading in the case. There did not arise in said case any question at all akin to the one sought by opposing counsel to be injected into the case at bar. The purchaser's motion in the Glover case to quash the *scire facias* seeking to revive the suit was overruled, and thereupon he pleaded to the merits. The case was tried on its merits and decided for the plaintiff and the defendant, the purchaser, appealed to the State Supreme Court. The State Supreme Court held that error could not be predicated of the judgment overruling the motion to quash the *scire facias.*

It is apparent, we think, that the motion in the Glover case to quash the *scire facias* largely involved the same questions as were presented by the plea to the merits.

The motion and the plea to the merits both involved the question whether the purchaser was liable to the plaintiff because of his assumption to pay the liabilities incurred by the receivers in their operation of the railroad. If the purchaser assumed the liability pleaded in the declaration his motion to quash the *scire facias* was properly overruled. If he did not so assume his plea to the merits should have been maintained. On the trial under his plea to the merits, he had the right to show that he had not assumed the liability sued upon by the plaintiff, and this of course rendered the disposition of his motion immaterial, and hence, on appeal he could not predicate error of the judgment overruling his motion to quash the *scire facias*.

THIRD. A CONCLUDING OBSERVATION.

There are some parts of the brief to which we are replying which seem by indirection to claim that this suit was instituted in a court having territorial jurisdiction of the place where plaintiff is alleged to have suffered the injury pleaded in his declaration. To such argumentation we reply: The decisions and opinions of the trial court and of the State Supreme Court in this case dispose of all questions touching the fact that this suit was instituted and prosecuted in a court in which it was prohibited to be brought, "If Order No. 18, issued by the Director General of Railroads, is (was) a valid exercise of power vested in him," to quote from the opinions.

Both courts affirmatively announced that fact and both necessarily decided that, if Order No. 18 was valid, this suit was wrongfully instituted in the Court where it was begun and prosecuted to judgment.

Respectfully submitted,

J. Blanc Monroe of New Orleans, Louisiana
Monte M. Lemann of New Orleans, Louisiana
Robert H. Thompson of Jackson, Mississippi
Attorneys for Petitioners and Plaintiffs in Error.

The undersigned attorney for Smith Journey, defendant in error, has this day received from Robert H. Thompson, one of the attorneys for the Alabama & Vicksburg Railway Company et al., petitioners and plaintiffs in error———copies of the above and foregoing Reply Brief.

Jackson, Mississippi, September —, 1920.

.....

Attorney for Smith Journey, Defendant in Error.

ALABAMA & VICKSBURG RAILWAY COMPANY ET AL. *v.* JOURNEY.

ERROR AND CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI.

No. 55. Argued October 21, 1921.—Decided November 7, 1921.

1. The order of the Director General of Railroads, prescribing that all suits against carriers while under federal control must be brought in the county or district where the plaintiff resided at the time of the accrual of the cause of action or in the county or district where the cause of action arose, was a reasonable exercise of the power conferred by Congress on the President, through the Federal Control Act. P. 114. *Missouri Pacific R. R. Co.* v. *Ault*, 256 U. S. 554.
2. So *held*, where the action was against the railroad company, in a state court, on a cause which arose before federal control.

122 Miss. 742, reversed.

CERTIORARI to a judgment of the Supreme Court of Mississippi affirming a judgment for damages against the present petitioners.

Mr. J. Blanc Monroe, with whom *Mr. Monte M. Lemann* and *Mr. R. H. Thompson* were on the briefs, for plaintiffs in error and petitioners.

Mr. Robert B. Mayes, for defendant in error and respondent, submitted. *Mr. J. A. Teat*, *Mr. Chalmers Potter* and *Mr. Clayton D. Potter* were also on the brief.

MR. JUSTICE BRANDEIS delivered the opinion of the court.

On April 30, 1918, Smith Journey sued the Alabama & Vicksburg Railway Company in the Circuit Court for the Second District of Hinds County, Mississippi, for an injury suffered on October 24, 1917. At the time of the accident the railroad was being operated by the company. When suit was brought the railroad was under federal control. The company pleaded in abatement that the plaintiff was not a resident of Hinds County when the alleged injury occurred and that the alleged cause of action did not arise in the district of the county in which suit was brought. And it set up Order No. 18 of the Director General of Railroads, as amended April 18, 1918, which prohibited the institution of suits against railroads under federal control in the court for any district other than that in which the plaintiff had resided or in which the alleged cause of action arose.[1] A demurrer to the

[1] *General Order No. 18.* April 9, 1918.

Whereas the Act of Congress approved March 21, 1918, entitled, "An Act to Provide for the Operation of Transportation Systems While under Federal Control," provides (section 10) "That carriers while under Federal control shall be subject to all laws and liabilities as common carriers, whether arising under State or Federal laws or at common law, except in so far as may be inconsistent with the provi-

plea was sustained; the plaintiff then recovered a verdict; and the judgment entered thereon was affirmed by the highest court of the State. 122 Miss. 742. The case was brought here by writ of error. A petition for a writ of certiorari was also filed and consideration of the latter was postponed until the hearing on the writ of error. It is now granted; and the writ of error is dismissed.

The Supreme Court of Mississippi overruled the plea in abatement on the ground that Order No. 18 exceeded the powers conferred by Congress on the President and by him on the Director General. Whether the state court erred in so holding is the only question before us. That it

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sions of this Act or with any order of the President. . . . But no process, mesne or final, shall be levied against any property under such Federal control"; and,

Whereas it appears that suits against the carriers for personal injuries, freight and damage claims, are being brought in States and jurisdictions far remote from the place where plaintiffs reside or where the cause of action arose, the effect thereof being that men operating the trains engaged in hauling war materials, troops, munitions or supplies, are required to leave their trains and attend court as witnesses, and travel sometimes for hundreds of miles from their work, necessitating absence from their trains for days and sometimes for a week or more; which practice is highly prejudicial to the just interests of the government and seriously interferes with the physical operation of the railroads; and the practice of suing in remote jurisdictions is not necessary for the protection of the rights or the just interests of plaintiffs.

It is therefore ordered, that all suits against carriers while under Federal control must be brought in the county or district where the plaintiff resides, or in the county or district where the cause of action arose.

General Order No. 18A. April 18, 1918.

General Order No. 18, issued April 9, 1918, is hereby amended to read as follows:

"It is therefore ordered that all suits against carriers while under Federal control must be brought in the county or district where the plaintiff resided at the time of the accrual of the cause of action or in the county or district where the cause of action arose."

did err is clear from what we said in *Missouri Pacific R. R. Co.* v. *Ault*, 256 U. S. 554, decided since entry of the judgment under review. Section 10 of the Federal Control Act of March 21, 1918, c. 25, 40 Stat. 451, 456, permitted enforcement of liabilities against carriers while under federal control except "in so far as may be inconsistent . . . with any order of the President." It was within the powers of the Director General to prescribe the venue of suits; and the facts set forth in the order show both the occasion for it and that the venue prescribed was reasonable.

Writ of error dismissed.
Writ of certiorari granted.
Judgment reversed.